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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No.

EVRA CORPORATION, formerly known as Hyman-Michaels Company,

Petitioner,

v.

SWISS BANK CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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September 21, 1982

QUESTIONS PRESENTED

1. Whether banks which negligently lose telex directions should be insulated from recovery of damages by injured customers.

2. Whether the Court of Appeals violates Rule 52(a) of the Federal Rules of Civil Procedure by ignoring the trial court's findings of fact and substituting its own de novo findings.

3. Whether the Court of Appeals in a diversity action can disregard the law of the state whose law governs the case.

4. Whether the Court of Appeals' reading of Hadley v. Baxendale is applicable to contemporary international banking transactions.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
OPINIONS BELOW	2
JURISDICTION	2
STATEMENT OF THE CASE	3
I. MATERIAL FACTS	3
II. PROCEEDINGS BELOW	12
REASONS FOR GRANTING THE WRIT	14
I. THE COURT OF APPEALS ERRS IN INSULATING BANKS FROM DAMAGES FOR LOSING DIRECTIONS SENT BY TELEX.....	14
II. THE COURT OF APPEALS VIOLATES RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE BY DISREGARDING THE TRIAL COURT'S FINDINGS OF FACT.....	18
A. The Court of Appeals Substitutes Its De Novo Findings Concerning the Forseeability of Damages.....	20
B. The Court of Appeals Substitutes Its Findings Concerning Contributory Negligence.....	24

PAGE

III. THE COURT OF APPEALS IMPROPERLY IGNORES CONTROLLING ILLINOIS LAW WHICH ALLOWS A PRINCIPAL TO RECOVER A TORT MEASURE OF DAMAGES FOR A BREACH OF DUTY BY AN AGENT..... 32

IV. THE COURT OF APPEALS' READING OF HADLEY V. BAXENDALE IS INAPPLICABLE TO CONTEMPORARY INTERNATIONAL BANKING TRANSACTIONS..... 38

CONCLUSION 42

TABLE OF AUTHORITIES

PAGE

Cases

Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981) 24

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 36

Gurney Industries, Inc. v. St. Paul Fire & Marine Ins. Co., 467 F.2d 588 (4th Cir. 1972) ... 40

Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854) 32-42

Miller v. John, 111 Ill. App. 56 (2d Dist. 1903) 34

McAllister v. United States, 348 U.S. 20 (1954) 25

O'Brien v. Chicago & N.W. Ry. Co., 329 Ill. App. 382, 68 N.E.2d 638 (1946) 36

Siegel v. Western Union Tel. Co., 312 Ill. App. 86 (1941) 33

The Heron II, Koufos v. C. Czarnikow, Ltd., [1967] 3 All ER 686, [1969] 1 AC 350 at 385.. 40

United States v. Hill Lines, Inc., 175 F.2d 770 (5th Cir. 1949) ... 25

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 19

PAGE

Statutes

28 U.S.C. § 1254 (1) 3

Rule 52(a), Fed. Rules of Civil Procedure 19

Other Authorities

2 Harper & James, The Law of Torts, § 20.5 (1956) 36

G. Gilmore, The Death of Contract, 83-84, 88 (1974) 40

Patterson, The Apportionment of Risks Through Legal Devices, 24 Colum. L. Rev. 335, 342 (1924) 32

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No. _____

EVRA CORPORATION, formerly known as Hyman-Michaels Company,

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SWISS BANK CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Evra Corporation,[1] formerly known as Hyman-Michaels Company ("Hyman-Michaels"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the

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1/ Pursuant to Rule 28.1 of the Rules of the Court, the following is a listing naming all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Petitioner Evra Corporation: None.

Seventh Circuit entered in this proceeding on March 19, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals, reversing the decision of the District Court and reported at 673 F.2d 951 (7th Cir. 1982), appears as Appendix A to this petition. The decision of the District Court for the Northern District of Illinois is reported at 522 F. Supp. 820 (1981), and appears as Appendix B to the petition.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on March 19, 1982. A timely petition for rehearing in banc was denied on June 23, 1982, and this petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. MATERIAL FACTS

This dispute arose following the mishandling of an intercontinental telex message by Swiss Bank Corporation ("Swiss Bank"), a major international bank with offices throughout the world, resulting in petitioner Hymar Michaels' loss of a ship charter worth two million one hundred thirty seven thousand seven hundred thirty one and 65/100 dollars ($2,137,731.65). Swiss Bank either lost the telex message or failed to have paper in its receiving telex machine at the time that the message was received. The mishandled telex directed Swiss Bank to make payment to the ship owner's account at Banque de Paris et des Pays-Bas ("Banque de Paris") in Geneva, Switzerland, in payment of an install-

ment of charter hire for the ship, M.V. Pandora. Since the payment was not made as directed by the telex, the owner was permitted by an arbitration panel to withdraw the ship from charter.

Petitioner Hyman-Michaels,[2/] an Illinois corporation engaged in the international and domestic purchase and sale of scrap metals, entered into a ship charter with the Pandora Shipping Company in June, 1972. Payments were to be made semi-monthly in advance to the owner's account at Banque de Paris in Geneva, Switzerland. Hyman-Michaels made the payments of the first, fifth and eighth through eighteenth installments of the charter hire by wire transfers through Continental Illinois National Bank and Trust Company of Chicago

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[2/] Hyman-Michaels sold its scrap metal business and changed its name to Evra Corporation in 1976.

("Continental") and Swiss Bank.

Swiss Bank had a correspondent banking relationship with Continental, i.e., it maintained an account at Continental in Chicago, Illinois, and allowed its account to be credited for the purpose of transmitting such credits to its customers, such as Banque de Paris, which did not maintain direct accounts with Continental. Payment was accomplished by Continental first debiting Hyman-Michaels' account and crediting Swiss Bank's account, then notifying Swiss Bank by means of a telex that Swiss Bank's account in Chicago had been credited and instructing Swiss Bank to credit Banque de Paris' account. Continental used its London branch as a relay station for all telex transfers to Europe.

In October, 1972, the owner of the Pandora attempted to withdraw its ship from the charter because the seventh installment, which had been mailed and was due on October 26, had not been

received by Banque de Paris. The matter was submitted to an arbitration panel, which ruled that the owner could not withdraw the ship but which placed Hyman-Michaels on notice that the payment provision of the charter would be strictly enforced thereafter. Beginning with the eighth installment payment, the procedure followed by Hyman-Michaels was to have its accounting department make a request to Continental to effect a wire transfer a few days before each charter hire payment was due.

At or about 9:17 A.M. on Wednesday, April 25, 1973, Hyman-Michaels, in accordance with the payment procedure it had used since October, 1972, telephoned Continental and requested that it make a wire transfer of $27,000.00 to the account of the Pandora's owner at Banque de Paris for the charter hire period of April 27 through May 11, 1973. Payment of this installment was due at or before 9:00 P.M. Geneva time on Friday, April

27, 1973. Continental immediately debited Hyman-Michaels' account and credited Swiss Bank's account. The requested telex was sent on the afternoon of April 25 to Continental's London office for retransmittal to Swiss Bank in Geneva.

Early the next morning, a telex operator in Continental's London office dialed, as instructed, Swiss Bank's general telex number, which rings in the bank's cable department. After trying unsuccessfully for almost an hour to reach the general number, the Continental telex operator dialed the number of a machine in Swiss Bank's foreign exchange department, which he had used several times in the past when the general number was engaged without objection by Swiss Bank. It is undisputed that this machine received the telexed message because Continental's copy of the telex contained a confirmed answer back code at the beginning and at

the end of the message. The answer back code is printed on the sender's telex by means of electrical impulses generated by the receiving machine. It confirms that there is a through connection between the two machines. Despite receiving the telex, Swiss Bank failed to comply with the payment order, and no transfer of funds was made to the account of the Pandora's owner in the Banque de Paris.

Swiss Bank either (a) lost the April 25, 1973 telex message, or (b) failed to have paper in its machine at the time that the message was being received, in which case no actual copy of the message would have been produced. Despite receiving an average of three to four telexes per week destined for other departments of the bank, Swiss Bank's foreign exchange room had no procedure for logging these telexes or insuring that they were promptly acted upon. Additionally, in April, 1973, Swiss

Bank's telex machines in its foreign exchange room were not equipped to make copies of telex messages received. Nor did these machines automatically shut off when they ran out of paper, but continued to receive messages which were not recorded in any manner. Moreover, Swiss Bank had no systematic method of checking the telex machines in the foreign exchange room to see if they had paper. The machines were operated by junior foreign exchange dealers who were not professional telex operators.

At about 8:30 A.M. (Chicago time) on Friday, April 27, 1973, Hyman-Michaels received a telex message from the owner of the Pandora stating that the charter was cancelled because the nineteenth installment had not been paid to its account at Banque de Paris. By 9:00 A.M., Hyman-Michaels contacted Continental and instructed Continental to instruct its correspondent, Swiss Bank, to persist in attempting to effect the

payment even in the face of a rejection by the owner's bank. Hyman-Michaels also telephoned the owner's representative in Geneva on the same morning and told him that payment had been made. The owner persisted in his decision to withdraw and notified Hyman-Michaels that all further attempts to effect payment would be rejected. Hyman-Michaels' admiralty counsel in New York were also informed of the situation that morning. They contacted the owner's attorneys and reached an agreement that day for the submission of the dispute to arbitration.

Also on April 27, 1973, Continental attempted to determine what had gone awry with the telex it had sent. After determining that the telex had been sent but that Swiss Bank had no record of it, Continental asked Swiss Bank if the transfer could be carried out by giving the tested telex code and payment instructions over the telephone. Continental was informed by Swiss Bank, however,

that it was too late (it being approximately 6:00 P.M. in Geneva at that time). No action was taken on the following two days, Saturday, April 28 or Sunday, April 29, 1973. On Monday, April 30, 1973, Continental instructed its Geneva representative to try to find out what had happened to the April 25 wire transfer.

After additional efforts by Swiss Bank to locate the missing telex message, Swiss Bank suggested to Continental, on May 1, 1973, that it retransmit the telex to the general telex number, which Continental did that afternoon. Swiss Bank retransmitted the May 1, 1973 telex to Banque de Paris on May 2, 1973.

On May 21, 1973, following arbitration hearings, the arbitrators held that the owner was entitled to withdraw the Pandora from the charter. In their decision, however, the arbitrators stated that "the root cause of this situation did not lie with [Hyman-Michaels],

as very definite proof was shown to the Panel that payment was properly made by [Hyman-Michaels] in sufficient time on April 25th A.M., through their Bank, Continental. . . ." The arbitrators also stated that Hyman-Michaels was not alerted to the fact that Swiss Bank had lost the instructions and failed to make payment in time until Hyman-Michaels received a message from the owner on April 27th at 8:30 A.M. Chicago time. On July 5, 1973 the arbitrators' decision was confirmed by the United States District Court for the Southern District of New York.

II. PROCEEDINGS BELOW

As a result of the loss of its ship charter, the petitioner Hyman-Michaels, an Illinois corporation with its principal place of business in Chicago, brought this action against Swiss Bank, a Swiss corporation with its principal office in Basle, Switzerland, in a federal court

in the Northern District of Illinois on the basis of diversity of citizenship, seeking to recover its expenses in the second arbitration proceeding plus the profits that it lost because of the cancellation of the charter. At the time the ship charter was withdrawn, Hyman-Michaels had sub-chartered the Pandora at a rate double the rate fixed in the charter. Its lost profits are based on the difference between the charter and subcharter rates.

The case was tried to a district judge without a jury, who decided that Swiss Bank had been negligent and under Illinois law was liable to Hyman-Michaels for $2.1 million in damages. 522 F. Supp. 820 (1981). This figure consisted of about $16,000.00 in arbitration expenses and the rest in lost profits on the subcharter of the Pandora. All other claims, cross-claims and counter-claims by the parties were denied.

The $2.1 million judgment rendered

by the District Court in petitioner's favor was reversed by the Court of Appeals for the Seventh Circuit on the grounds that the doctrine of Hadley v. Baxendale precludes the recovery by Hyman-Michaels of its expenses and lost profits and that Hyman-Michaels acted imprudently. 673 F.2d 951 (7th Cir. 1982). Judgment was, therefore, entered for Swiss Bank and costs of appeal assessed against Hyman-Michaels.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRS IN INSULATING BANKS FROM DAMAGES FOR LOSING DIRECTIONS SENT BY TELEX.

The Court of Appeals fashions a rule of law which insulates banks from recovery of damages by customers whose telex directions have been negligently lost or mishandled by banks. No legal basis exists for according banks such privileged status at the expense of customers.

As recognized by the Court of Appeals, this is a case of first impression in Illinois and apparently in reported common law. At issue is the degree of care required of the international banking community in its handling of wire transfers of funds. Under the guise of determining the extent of damages to be awarded where a bank negligently fails to transfer funds when requested to do so by wire, the Court of Appeals enunciates a rule of law which effectively insulates banks from liability by making virtually impossible the recovery of consequential damages occasioned by such conduct.

The rule of law which follows from the Court's opinion provides that although a bank can foresee that its failure to act promptly on a telexed request to transfer funds could cause substantial damage, "that kind of general foreseeability...does not justify an award of consequential damages." 673 F.2d at

959. Instead, the Court requires that banks have intimate and detailed knowledge of the transaction underlying the direction to transfer funds before banks will be held to have foreseen the harm that results from failing to follow the direction. This requirement effectively eliminates the possibility of recovering consequential damages against a bank in cases such as the present one.

In applying this new principle of law to the facts in the present case, the Court acknowledges that Swiss Bank did have knowledge concerning the underlying transaction. The Court finds that "[Swiss Bank] knew or should have known, from Continental Bank's previous telexes, that Hyman-Michaels was paying the Pandora Shipping Company for the hire of a motor vessel named Pandora." 673 F.2d at 956. The Court also does not dispute the District Court's finding that a major international bank should know that a failure to act promptly on a

telexed direction to transfer funds could cause substantial damage. Nonetheless, the Court refuses to affirm the District Court's award to Hyman-Michaels of $2.1 million in damages because Swiss Bank "did not know when payment was due, what the terms of the charter were, or that they had turned out to be extremely favorable to Hyman-Michaels." Id. at 956. Moreover, the Court thinks it necessary that Swiss Bank know that the Pandora's owner would try to cancel the charter if Hyman-Michaels was late in making payment in order for Swiss Bank to have foreseen that its failure to transfer funds, as directed, would result in substantial damages to Hyman-Michaels. Id.

The rule the Court fashions effectively precludes recovery of damages from a bank which negligently fails to perform as directed by telex, as illustrated by its application in the present case. It is unrealistic to expect that

customers can inform all banks that may participate in a fund transfer accomplished by telexed directions of the myriad of facts concerning the underlying transaction necessitating the transfer. In fact, businessmen and bankers would have time for nothing else but conversing with each other if banks were informed of all of the contingencies surrounding each request to transfer funds.

Precluding the recovery of consequential damages is tantamount to insulating banks from liability since there are typically no direct damages caused by a bank's negligent failure to follow telexed directions. There is no basis, either in law or fact, for according banks such status, to the detriment of bank customers, which places them beyond the law despite grossly negligent conduct. The Court of Appeals, therefore, errs in applying this rule to the facts in this case.

II. THE COURT OF APPEALS VIOLATES RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE BY DISREGARDING THE TRIAL COURT'S FINDINGS OF FACT.

The District Court, after a three-week trial, was shocked by Swiss Bank's "cavalier" attitude toward the handling of major transactions accomplished by telex. 522 F. Supp. at 820. The District Court found as follows:

> The facts indicate an appalling lack of regard on the part of Swiss Bank for the more than reasonably foreseeable possibility that the negligent maintenance of its foreign exchange telex machines could result in substantial damage to one of its customers. The burden of guarding against such a possibility is minimal in view of the potential injury involved. As between Hyman-Michaels and Swiss Bank, the negligence and carelessness of Swiss Bank is the proximate cause of the loss suffered by plaintiff Hyman-Michaels. (Emphasis added) 522 F. Supp. at 829.

The Court of Appeals, employing a theory of risk allocation never considered by the District Court, proceeds to ignore the District Court's findings of fact concerning foreseeability of damages and contributory negligence. The Court's

substitution of its own findings of fact for those of the District Court violates the "clearly erroneous" standard provided by Rule 52(a) of the Federal Rules of Civil Procedure. Moreover, the Court of Appeals errs in failing to remand the case for new findings, as it admits it could do, if the District Court's findings were inadequate. 673 F.2d at 959. Therefore, the ruling of the Court of Appeals should be reversed.

Rule 52(a) provides, in applicable part, that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." (Emphasis added). The question for the Court of Appeals is not whether it would have made the findings the trial court did, but whether on the entire evidence it is left with the definite and firm conviction that a mistake has been committed. Zenith Radio Corp. v.

Hazeltine Research, Inc., 395 U.S. 100 (1969). The Court of Appeals egregiously violates this principle in the present case by substituting totally unsubstantiated findings for findings of the District Court which are based on the credible evidence of record.

A. The Court of Appeals Substitutes Its De Novo Findings Concerning the Foreseeability of Damages.

The Court of Appeals, on the basis of its own erroneous findings of fact, concludes that Swiss Bank did not have enough information to infer that if it lost a $27,000 payment order it would face a liability in excess of two million dollars. 673 F.2d 951, 956. The Court concedes that Swiss Bank knew or should have known, from Continental Bank's previous telexes, that Hyman-Michaels was paying the Pandora Shipping Company for the hire of a motor vessel named Pandora. Id. The Court finds, however, that Swiss Bank did not know when pay-

ment was due. Id. In so holding, the Court of Appeals completely ignores the District Court's explicit factual finding that failure to act promptly upon receipt of a telex message could result in substantial damage to a customer of the bank. 522 F. Supp. 820, 833. The District Court's finding is supported by substantial evidence of record.

Mr. Keith Foulds, an officer of the British Post Office and an expert on telex communications, testified that the use of a telex denotes that time is of the essence. (Tr. 830). This conclusion was confirmed by Mr. John Biella, an officer of Continental who headed its international operations department. (Tr. 1188). The District Court therefore found that "[t]he fact that plaintiff was transferring funds by wire rather than through the mail was sufficient to alert Swiss Bank to the importance of the transaction" and that "Swiss Bank, as a major international bank, could reasonably foresee that

failure to act promptly upon receipt of such a telex message could result in substantial damage to a customer of the bank." 522 F. Supp. 820, 833.

Moreover, the face of the telex itself advised Swiss Bank that the due date for payment on the ship charter was imminent. The telex states, in part: "HIRE MV PANDORA FOR PERIOD APRIL 27 MAY 11-73. . . ." Had Swiss Bank actually seen the message which was received by its telex machine, instead of negligently mishandling it, it would have been apparent to Swiss Bank that the payment was due on or before the date beginning the period of hire. Certainly, anyone who has ever paid rent on a monthly basis on an apartment knows that in most cases the payment is due on or before the date beginning the monthly rental period. Additionally, the Court of Appeals acknowledges that Swiss Bank knew or should have known Hyman-Michaels was making payment for hire of a ship. 673 F.2d at 956. Thus there was ample

support for the District Court's finding that the type of harm which occured, the loss of the ship charter, was foreseeable to Swiss Bank at the time the telex was received. 522 F. Supp. at 833.

The Court of Appeals' conclusion that such "general foreseeability" does not justify an award of consequential damages, on the other hand, is based on a substitution of its own finding, contrary to the "clearly erroneous" standard and without any support in the record, that "[e]lectronic funds transfers are not so unusual as to automatically place a bank on notice of extraordinary consequences if such a transfer goes awry." 673 F.2d at 956. Given the evidence of record concerning information available to Swiss Bank at the time of the transaction, the findings of the District Court concerning foreseeability were not clearly erroneous and should have been followed by the Court of Appeals.

B. The Court of Appeals Substitutes Its Findings Concerning Contributory Negligence.

The Court of Appeals also improperly substitutes its findings of fact for those of the District Court on the question of Hyman-Michaels' ability to avoid or minimize the consequences of Swiss Bank's acknowledged negligence and then proceeds to bar Hyman-Michaels from recovery by reason of its supposed imprudence.[3/] 673 F.2d at 957. The District Court had squarely found that Hyman-Michaels had not acted imprudently. 522 F. Supp. at 831. It is well established that the determination of contributory negligence is a question of fact

3/ Contributory negligence is no longer a bar to recovery of damages in Illinois, which adopted the principle of comparative negligence subsequent to trial of the present case. Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981). A retrial of this cause would, therefore, be governed by the principle of comparative negligence.

which cannot be overturned on appeal unless there is no support for such a finding in the record. United States v. Hill Lines, Inc., 175 F.2d 770 (5th Cir. 1949). See also McAllister v. United States, 348 U.S. 20 (1954).

The Court of Appeals erroneously asserts at two separate points in its opinion that Hyman-Michaels waited until the last possible moment to try to make payment. 673 F.2d at 956, 957. This conclusion flies directly in the face of the explicit factual finding by the District Court, based on uncontroverted evidence, that Hyman-Michaels gave the banks three business days lead time, a day more than was advised by Continental itself, to carry out a communication which is "essentially instantaneous." 522 F.Supp. at 831. Moreover, the District Court found that a three-day lead time for effecting payment was reasonable. 522 F. Supp. at 831. The uncontroverted evidence at trial supports

the District Court's finding. (Tr. 319-20; 81.)

Additionally, and perhaps most importantly, the Court of Appeals ignores two crucial factual findings of the District Court:

(1) "There is no evidence that a longer lead time would have insured a different outcome, given the customary procedures of the defendant banks"; and

(2) "Even with a longer lead time, plaintiff still would not have learned of the non-receipt of the nineteenth installment until notified by the owner on April 27, 1973." 522 F. Supp. at 831-32.

Thus, even if Hyman-Michaels had sent the telexed payment instruction three weeks in advance, instead of three days, Hyman-Michaels still would not have learned of the owner's non-receipt and intention to withdraw the Pandora until the owner telexed Hyman-Michaels on the morning of April 27, 1973, the day payment was due.

The Court of Appeals again errs in finding that Hyman-Michaels failed to "pull out all the stops" and "dithered" upon being notified by the owner of its intention to withdraw the charter. On the basis of these erroneous findings, the Court wrongly concludes that Hyman-Michaels had been "imprudent" in its post-notification conduct. 673 F.2d at 954. Nothing could be farther from the facts, as reflected by the evidence of record and as found by the District Court. The District Court found that almost immediately upon receiving notification of the owner's intentions, Hyman-Michaels:

(1) contacted Continental to advise it of the problem and instructed Continental to instruct its correspondent, Swiss Bank, to persist in attempting to effect the payment even in the face of a rejection by the owner's bank;

(2) telephoned the owner's representative on the morning of April 27, and told him that payment had been made; and

(3) informed its admiralty counsel in New York City of the situation who, in turn, contacted the owner's attorneys and reached an agreement that day to submit the matter to arbitration. 522 F. Supp. at 825.

The Court of Appeals improperly ignores these findings of fact and asserts that Hyman-Michaels is culpable for failing to wire a "duplicate payment" immediately after being notified by the owner. The Court's statement illustrates its misunderstanding of the nature of the transaction. The original payment had never been lost or misplaced so there was no need for Hyman-Michaels to again withdraw funds from its account at Continental and place funds into Swiss Bank's account. Swiss Bank still had the funds originally transferred by Hyman-Michaels. What had been lost was the message to Swiss Bank sent by Continental advising Swiss Bank that funds had been placed in its account at Continental and directing that it transfer

funds to the owner's bank, with which Continental had no correspondent banking relationship. The difficulty was not in making the payment to Swiss Bank but in getting Swiss Bank to effect payment to the owner. Therefore, Hyman-Michaels' re-instruction to Continental, and indirectly to Swiss Bank, to effect the payment was precisely the proper action to take and was correctly held to be so by the District Court. 522 F. Supp. at 829.

Instead of acting in accordance with Hyman-Michaels' instructions, however, the banks decided to first try to trace the lost telex. Although Hyman-Michaels told the banks to effect payment and never asked the banks to trace the first telex, the Court of Appeals improperly imputes the actions of the banks to Hyman-Michaels in finding that Hyman-Michaels "allowed things to slide until May 2," the date on which the original telexed direction to effect

payment was retransmitted by Continental to Swiss Bank and acted upon by Swiss Bank. 673 F.2d at 957. Pursuant to the agreement between Hyman-Michaels and the owner, previously entered into on April 27, 1973, the owner accepted the payment from Swiss Bank on May 2, 1973. (Swiss Bank Appendix, p. 219).

By improperly substituting its own erroneous view of the facts for those findings by the District Court, and then barring petitioner from recovery because of its supposed misconduct, the Court of Appeals violates the principal purpose of Rule 52(a) of avoiding a de novo trial of the facts by a reviewing court. Moreover, the findings of the Court of Appeals distort the reality of international wire transfers of funds so as to permit Swiss Bank to avoid culpability for its egregious misconduct. The decision of the Court of Appeals should, therefore, be reversed.

III. THE COURT OF APPEALS IMPROPERLY IGNORES CONTROLLING ILLINOIS LAW WHICH ALLOWS A PRINCIPAL TO RECOVER A TORT MEASURE OF DAMAGES FOR A BREACH OF DUTY BY AN AGENT.

The Court of Appeals, in fashioning its own rule of law to deny recovery to Petitioner, ignores controlling Illinois case law which requires application of a tort measure of damages. The Court mistakenly determines that Illinois courts would apply the principle of Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854), in the present case. As a result, the Court applies a stringent contract foreseeability standard in determining that Hyman-Michaels could not recover the damages proximately flowing from Swiss Bank's negligent conduct, rather than the less stringent standard applicable in tort cases. The Hadley limitation, of course, applies only in contract cases. See, e.g., Patterson, The Apportionment of Risks Through Legal Devices, 24 Colum. L. Rev. 335, 342

(1924). Under the proper tort standard, which Illinois courts follow, Hyman-Michaels is clearly entitled to a recovery of its lost profits.

Hyman-Michaels brought suit against Swiss Bank based on the tort theory of negligence. The Court of Appeals acknowledges that "there is an irreducible amount of speculation involved . . ." in its conclusion that Iliinois courts would limit a plaintiff to contract damages in a case alleging a tort where, as here, there is no contract between the parties. 673 F.2d at 956. The Court claims it is forced to speculate because it can find no Illinois case which has previously considered this issue. Indeed, the Court finds it only implicit in the case it relies on, Siegel v. Western Union Tel. Co., 312 Ill. App. 86 (1941), that Illinois courts would apply Hadley in the present case. The Court's supposition is based on the fact that, despite a statement in

the Siegel decision that the defendant had conceded its negligence, Hadley is still applied in determining the proper measure of damages.

The Court fails to note, however, that Siegel is pleaded as a contract action. There is no mention anywhere in the decision that the plaintiff alleged the defendant's negligence constituted a tort. Thus, the Siegel court never considered the key issue now facing this Court of whether Hadley applies where a plaintiff sues in tort in the absence of a contract.

In Miller v. John, 111 Ill. App. 56 (2d Dist. 1903), which was cited to the Court of Appeals in Hyman-Michaels' Petition For Rehearing, plaintiff sued in an action on the case for fraud and deceit in two counts. Count I alleged wrongful intention to defraud and deceive. Count II alleged that defendants represented they would, as plaintiff's agent, trade and exchange for the plain-

tiff his farm for farm lands of greater value and that defendants made false and fraudulent representations.

Following a verdict for plaintiff, it was contended by defendants, on appeal, that their motion for a new trial should have been sustained because, inter alia, "there was a misjoinder of causes of action in the declaration; the argument being that because the second count sets out the contractual relation of principal and agent, that the second count is based on contract and that the measure of damages under the two counts is entirely different." Id. at 59. In response, the Court stated:

> "While the second count introduces the relation of principal and agent, it is not a count on the contract, but is in tort for fraud and deceit. The relation of principal and agent is no reason why the agent may not be sued in an action of tort by his principal, and in such case the measure of damages is the same as if the relation did not exist. (Emphasis added.) Id.

Thus, Miller holds that where, as here, a principal (Hyman-Michaels)

sues its agent (Swiss Bank), it may sue in tort and the court will apply a tort measure of damages. The Court of Appeals could have avoided speculating as to Illinois law by following the guidance provided by Miller. Its failure to do so constitutes a violation of the rule in Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), which requires a federal court to follow state law in a diversity action, and results in the application of an improper test of foreseeability of damages in the present case.

The standard of foreseeability applied in tort requires only that the resulting harm ought to have been foreseeable in a general way and not that the precise course or the full extent of the consequences be foreseeable. See 2 Harper & James, The Law of Torts, § 20.5 at 1147 (1956); O'Brien v. Chicago & N.W. Ry. Co., 329 Ill. App. 382, 68 N.E.2d 638 (1946). By contrast, the standard being applied by the Court of

Appeals, based on its erroneous interpretation of Hadley, requires that the breaching party have actual notice, in detail, of the special circumstances pertaining to the transaction. (See § IV, infra.)

The Court of Appeals acknowledges and does not controvert the finding of fact by the District Court that "'a major international bank' should know that a failure to act promptly on a telexed request to transfer funds could cause substantial damage. . . ." 673 F.2d at 959. Moreover, the District Court found that "Swiss Bank was aware of the fact that the telex machines in the Foreign Exchange Department were receiving three or four diverted messages per week which could involve large sums of money." 522 F. Supp. at 833.

There is no doubt, therefore, that Swiss Bank did foresee or at least ought to have foreseen "in a general way" the consequence of lost profits resulting

from its negligent mishandling of a telex, even if the precise extent of the harm might have been unforeseen. Since the harm was sufficiently foreseeable for purposes of awarding damages based on a tort, the Court of Appeals errs in holding that merely because Swiss Bank could not measure the precise potential harm to Hyman-Michaels, it should not be held liable for that harm. 673 F.2d at 958. This case was tried and decided by the District Court as a tort negligence case, and the Court of Appeals errs in deciding it as a contract case.

IV. THE COURT OF APPEALS' READING OF HADLEY V. BAXENDALE IS INAPPLICABLE TO CONTEMPORARY INTERNATIONAL BANKING TRANSACTIONS.

Even if Hadley v. Baxendale is applicable to the facts of this case, the Court of Appeals errs in applying a parsimonious reading of the Hadley rule in determining whether Hyman-Michaels is entitled to recover its consequential

damages. The Court interprets Hadley as providing that actual notice prior to a breach of "special" circumstances is a prerequisite for recovering consequential damages. In fact, however, English and American courts in modern times have substituted an objective test focusing on what may reasonably be assumed was within the contemplation of the parties in lieu of the archaic interpretation the Court of Appeals applies. A restrictive reading of the Hadley rule is particularly inappropriate in the context of contemporary international banking transactions.

In Britain, where the Hadley rule originated, a leading case has recently interpreted the rule as follows:

> The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would have realized that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed

> naturally from the breach or that loss of that kind should have been within his contemplation. (Emphasis added.) The Heron II, Koufos v. C. Czarnikow, Ltd., [1967] 3 All ER 686 at 691, [1969] 1 AC 350 at 385.

The "reasonable man" standard has also been adopted by American courts interpreting Hadley. See, e.g., Gurney Industries, Inc. v. St. Paul Fire & Marine Ins. Co., 467 F.2d 588 (4th Cir. 1972). The emergence of this modern, objective interpretation of Hadley in both English and American courts has been noted by at least one legal scholar. See G. Gilmore, The Death of Contract, 83-84, 88 (1974).

The objective standard is particularly appropriate in the context of the telecommunications field which has undergone dramatic changes since the horse and buggy days of Hadley, some 128 years ago. The telex transaction at issue here was not the result of an individually bargained-for agreement like the delivery of the mill shaft in Hadley. There was, in fact, no interface at all

between Hyman-Michaels and Swiss Bank prior to learning of the telex failure. Thus, there was no opportunity to discuss with Swiss Bank the detailed "special" circumstances surrounding the underlying transaction, as the Court of Appeals requires.

There were, however, specific factual findings by the District Court based on the evidence of record, that:

(1) Prior to losing the telex, Swiss Bank knew that three to four messages per week were being diverted to the foreign exchange room and that the average size of a telex transfer was in excess of a million dollars;

(2) three or four diverted messages per week constitutes sufficient notice of the potential risk involved to Swiss Bank's customers;

(3) diverted messages may involve large sums of money and that, if such a message is lost or not acted upon promptly, the damages suffered by the initiator may be substantial; and

(4) the fact that Hyman-Michaels was transferring funds by wire rather than through the mail was sufficient to alert Swiss Bank of the importance of the transaction. 522 F. Supp. at 829, 833.

Applying the appropriate objective standard of foreseeability to these facts, it is apparent that a reasonable man could have foreseen the damages which resulted from Swiss Bank's negligent loss of the telex directions. Thus, the Court of Appeals errs in finding that the rule in Hadley bars Hyman-Michaels from recovering its consequential damages of two million dollars.

CONCLUSION

After a three-week trial, the District Court held Swiss Bank liable for the damages caused by its "cavalier"[4/] and "appalling"[5/] misconduct. In reversing, the Court of Appeals relied on an economic theory never considered by

4/ 522 F. Supp. at 820.

5/ 522 F. Supp. at 829.

the trial court and fashioned a new rule of law which insulates banks from liability for losing telexed directions. The Court of Appeals disregards without any mention controlling Illinois case law which mandates application of a tort measure of damages and misapplies Hadley v. Baxendale. Finally, the Court of Appeals disregards key factual findings by the trial judge as to foreseeability of damages and contributory negligence and summarily reverses without allowing the trial court to apply the law to the facts proven upon trial.

The result visits severe injustice upon Petitioner by leaving it without a remedy for Swiss Bank's gross misconduct. It also leaves all bank customers who rely on telex communications without a remedy against gross carelessness by banks, leaves a misreading of nineteenth century British law as controlling modern banking transactions and leaves

courts of appeals free to disregard findings of fact by district courts as well as controlling state law.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.[6/]

Respectfully submitted,

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September 21, 1982

6/ Continental Illinois National Bank and Trust Company of Chicago was a counterdefendant-appellee and third-party defendant appellee in the proceeding below. Review by this Court of the judgments in favor of Continental is not sought here.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 81-1925, 81-1926

EVRA CORPORATION, formerly Hyman-Michaels Company, Plaintiff-Appellee and Counterplaintiff-Appellant,

v.

SWISS BANK CORPORATION, Denfendant-Appellant and Third-Party-Plaintiff-Appellant,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, Third-Party-Defendant-Appellee and Counterdefendant-Appellee.

Argued Feb. 17, 1982.

Decided March 19, 1982.

Before SWYGERT, Senior Circuit Judge, and WOOD and POSNER, Circuit Judges.

POSNER, Circuit Judge.

The question—one of first impression—in this diversity case is the extent of a bank's liability for failure to make a transfer of funds when requested by wire to do so. The essential facts are undisputed. In 1972 Hyman-Michaels Company, a large Chicago dealer in scrap metal, entered into a two-year contract to supply steel scrap to a Brazilian corporation. Hyman-Michaels chartered a ship, the *Pandora*, to carry the scrap to Brazil. The charter was for one year, with an option to extend the charter for a second year; specified a fixed daily rate of pay for the hire of the ship during both the initial and the option period, payable semi-monthly "in advance"; and provided that if payment was not made on time the *Pandora's* owner could cancel the charter. Payment was to be made by deposit to the owner's account in the Banque de Paris et des Pays-Bas (Suisse) in Geneva, Switzerland.

The usual method by which Hyman-Michaels, in Chicago, got the payments to the Banque de Paris in Geneva was to request the Continental Illinois National Bank and Trust Company of Chicago, where it had an account, to make a wire transfer of funds. Continental would debit Hyman-Michaels' account by the amount of the payment and then send a telex to its London office for retransmission to its correspondent bank in Geneva—Swiss Bank Corporation—asking Swiss Bank to deposit this amount in the Banque de Paris account of the *Pandora's* owner. The transaction was completed by the crediting of Swiss Bank's account at Continental by the same amount.

When Hyman-Michaels chartered the *Pandora* in June 1972, market charter rates were very low, and it was these

rates that were fixed in the charter for its entire term—two years if Hyman-Michaels exercised its option. Shortly after the agreement was signed, however, charter rates began to climb and by October 1972 they were much higher than they had been in June. The *Pandora's* owners were eager to get out of the charter if they could. At the end of October they thought they had found a way, for the payment that was due in the Banque de Paris on October 26 had not arrived by October 30, and on that day the *Pandora's* owner notified Hyman-Michaels that it was canceling the charter because of the breach of the payment term. Hyman-Michaels had mailed a check for the October 26 installment to the Banque de Paris rather than use the wire-transfer method of payment. It had done this in order to have the use of its money for the period that it would take the check to clear, about two weeks. But the check had not been mailed in Chicago until October 25 and of course did not reach Geneva on the twenty-sixth.

When Hyman-Michaels received notification that the charter was being canceled it immediately wired payment to the Banque de Paris, but the *Pandora's* owner refused to accept it and insisted that the charter was indeed canceled. The matter was referred to arbitration in accordance with the charter. On December 5, 1972, the arbitration panel ruled in favor of Hyman-Michaels. The panel noted that previous arbitration panels had "shown varying degrees of latitude to Charterers"; "In all cases, a pattern of obligation on Owners' part to protest, complain, or warn of intended withdrawal was expressed as an essential prerequisite to withdrawal, in spite of the clear wording of the operative clause. No such advance notice was given by Owners of M/V Pandora." One of the three members of the panel dissented; he thought the *Pandora's* owner was entitled to cancel.

Hyman-Michaels went back to making the charter payments by wire transfer. On the morning of April 25, 1973, it telephoned Continental Bank and requested it to transfer $27,000 to the Banque de Paris account of the *Pandora's* owner in payment for the charter hire period from April 27 to May 11, 1973. Since the charter provided for payment "in advance," this payment arguably was due by the close of business on April 26. The requested telex went out to Continental's London office on the afternoon of April 25, which was nighttime in England. Early the next morning a telex operator in Continental's London office dialed, as Continental's Chicago office had instructed him to do, Swiss Bank's general telex number, which rings in the bank's cable department. But that number was busy, and after trying unsuccessfully for an hour to engage it the Continental telex operator dialed another number, that of a machine in Swiss Bank's foreign exchange department which he had used in the past when the general number was engaged. We know this machine received the telexed message because it signaled the sending machine at both the beginning and end of the transmission that the telex was being received. Yet Swiss Bank failed to comply with the payment order, and no transfer of funds was made to the account of the *Pandora's* owner in the Banque de Paris.

No one knows exactly what went wrong. One possibility is that the receiving telex machine had simply run out of paper, in which event it would not print the message although it had received it. Another is that whoever took the message out of the machine after it was printed failed to deliver it to the banking department. Unlike the machine in the cable department that the Continental telex operator had originally tried to reach, the machines in the foreign exchange department were operated by junior foreign exchange dealers rather than by professional telex operators,

although Swiss Bank knew that messages intended for other departments were sometimes diverted to the telex machines in the foreign exchange department.

At 8:30 a.m. the next day, April 27, Hyman-Michaels in Chicago received a telex from the *Pandora's* owner stating that the charter was canceled because payment for the April 27-May 11 charter period had not been made. Hyman-Michaels called over to Continental and told them to keep trying to effect payment through Swiss Bank even if the *Pandora's* owner rejected it. This instruction was confirmed in a letter to Continental dated April 28, in which Hyman-Michaels stated: "please instruct your London branch to advise their correspondents to persist in attempting to make this payment. This should be done even in the face of a rejection on the part of Banque de Paris to receive this payment. It is paramount that in order to strengthen our position in an arbitration that these funds continue to be readily available." Hyman-Michaels did not attempt to wire the money directly to the Banque de Paris as it had done on the occasion of its previous default. Days passed while the missing telex message was hunted unsuccessfully. Finally Swiss Bank suggested to Continental that it retransmit the telex message to the machine in the cable department and this was done on May 1. The next day Swiss Bank attempted to deposit the $27,000 in the account of the *Pandora's* owner at the Banque de Paris but the payment was refused.

Again the arbitrators were convened and rendered a decision. In it they ruled that Hyman-Michaels had been "blameless" up until the morning of April 27, when it first learned that the Banque de Paris had not received payment on April 26, but that "being faced with this situation," Hyman-Michaels had "failed to do everything in [its] power to remedy it. The action taken was immediate but did not prove to be adequate, in that [Continental] Bank

and its correspondent required some 5/6 days to trace and effect the lost instruction to remit. [Hyman-Michaels] could have ordered an immediate duplicate payment—or even sent a Banker's check by hand or special messengers, so that the funds could have reached owner's bank, not later than April 28th." By failing to do any of these things Hyman-Michaels had "created the opening" that the *Pandora's* owner was seeking in order to be able to cancel the charter. It had "acted imprudently." The arbitration panel concluded, reluctantly but unanimously, that this time the *Pandora's* owner was entitled to cancel the agreement. The arbitration decision was confirmed by a federal district court in New York.

Hyman-Michaels then brought this diversity action against Swiss Bank, seeking to recover its expenses in the second arbitration proceeding plus the profits that it lost because of the cancellation of the charter. The contract by which Hyman-Michaels had agreed to ship scrap steel to Brazil had been terminated by the buyer in March 1973 and Hyman-Michaels had promptly subchartered the *Pandora* at market rates, which by April 1973 were double the rates fixed in the charter. Its lost profits are based on the differences between the charter and subcharter rates.

Swiss Bank impleaded Continental Bank as a third-party defendant, asking that if it should be ordered to pay Hyman-Michaels, then Continental should be ordered to indemnify it. Continental filed a cross-claim against Hyman-Michaels seeking to shift back to Hyman-Michaels the cost of any judgment that Swiss Bank might obtain against it, on the ground that any errors by Continental were caused by Hyman-Michaels' negligence. Hyman-Michaels in turn counterclaimed against Continental, alleging that Continental had both been negligent and broken its contract with Hyman-Michaels in failing to effect payment on April 26, and

was therefore liable to Hyman-Michaels along with Swiss Bank.

The case was tried to a district judge without a jury. In his decision, 522 F.Supp. 820 (N.D.Ill.1981), he first ruled that the substantive law applicable to Hyman-Michaels' claim against Swiss Bank was that of Illinois, rather than Switzerland as urged by Swiss Bank, and that Swiss Bank had been negligent and under Illinois law was liable to Hyman-Michaels for $2.1 million in damages. This figure was made up of about $16,000 in arbitration expenses and the rest in lost profits on the subcharter of the *Pandora*. The judge also ruled that Swiss Bank was not entitled to indemnification from Continental Bank, which made Continental's cross-claim moot; and lastly he dismissed Hyman-Michaels' counterclaim against Continental on the ground that Continental had not breached any duty to Hyman-Michaels. The case comes to us on Swiss Bank's appeal from the judgment in favor of Hyman-Michaels and from the dismissal of Swiss Bank's claim against Continental Bank, and on Hyman-Michaels' appeal from the dismissal of its counterclaim against Continental Bank.

Logically the first question we should address is choice of law. The parties seem agreed that if Swiss law applies, Hyman-Michaels has no claim against Swiss Bank, because under Swiss law a bank cannot be held liable to someone with whom it is not in privity of contract and there was no contract between Swiss Bank and Hyman-Michaels. Illinois does not have such a privity requirement. But this creates a conflict of laws only if Hyman-Michaels has a good claim against Swiss Bank under Illinois law; if it does not, then our result must be the same regardless of which law applies. Because we are more certain that Hyman-Michaels cannot recover against Swiss Bank under Illinois law than we are

that Swiss rather than Illinois law applies to this case under Illinois choice-of-law principles (which we must apply in a diversity suit tried in Illinois, see *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97, 61 S.Ct. 1020, 1021-22, 85 L.Ed. 1477 (1941)), we shall avoid the choice-of-law question and discuss Swiss Bank's liability to Hyman-Michaels under Illinois law without deciding—for, to repeat, it would make no difference to the outcome—whether it really is Illinois law or Swiss law that governs.

When a bank fails to make a requested transfer of funds, this can cause two kinds of loss. First, the funds themselves or interest on them may be lost, and of course the fee paid for the transfer, having bought nothing, becomes a loss item. These are "direct" (sometimes called "general") damages. Hyman-Michaels is not seeking any direct damages in this case and apparently sustained none. It did not lose any part of the $27,000; although its account with Continental Bank was debited by this amount prematurely, it was not an interest-bearing account so Hyman-Michaels lost no interest; and Hyman-Michaels paid no fee either to Continental or to Swiss Bank for the aborted transfer. A second type of loss, which either the payor or the payee may suffer, is a dislocation in one's business triggered by the failure to pay. Swiss Bank's failure to transfer funds to the Banque de Paris when requested to do so by Continental Bank set off a chain reaction which resulted in an arbitration proceeding that was costly to Hyman-Michaels and in the cancellation of a highly profitable contract. It is those costs and lost profits—"consequential" or, as they are sometimes called, "special" damages—that Hyman-Michaels seeks in this lawsuit, and recovered below. It is conceded that if Hyman-Michaels was entitled to consequential damages, the district court measured them correctly. The only issue is whether it was entitled to consequential damages.

If a bank loses a check, its liability is governed by Article 4 of the Uniform Commercial Code, which precludes consequential damages unless the bank is acting in bad faith. See Ill.Rev.Stat. ch. 26, § 4-103(5). If Article 4 applies to this transaction, Hyman-Michaels cannot recover the damages that it seeks, because Swiss Bank was not acting in bad faith. Maybe the language of Article 4 could be stretched to include electronic fund transfers, see section 4-102(2), but they were not in the contemplation of the draftsmen. For purposes of this case we shall assume, as the Second Circuit held in *Delbrueck & Co. v. Manufacturers Hanover Trust Co.*, 609 F.2d 1047, 1051 (2d Cir. 1979), that Article 4 is inapplicable, and apply common law principles instead.

Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854), is the leading common law case on liability for consequential damages caused by failure or delay in carrying out a commercial undertaking. The engine shaft in plaintiffs' corn mill had broken and they hired the defendants, a common carrier, to transport the shaft to the manufacturer, who was to make a new one using the broken shaft as a model. The carrier failed to deliver the shaft within the time promised. With the engine shaft out of service the mill was shut down. The plaintiffs sued the defendants for the lost profits of the mill during the additional period that it was shut down because of the defendants' breach of their promise. The court held that the lost profits were not a proper item of damages, because "in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences [the stoppage of the mill and resulting loss of profits] would not, in all probability, have occurred; and these special circumstances were here never communicated by the plaintiffs to the defendants." 9 Ex. at 356, 156 Eng.Rep. at 151.

The rule of *Hadley* v. *Baxendale*—that consequential damages will not be awarded unless the defendant was put on notice of the special circumstances giving rise to them—has been applied in many Illinois cases, and *Hadley* cited approvingly. See, e.g., *Underground Constr. Co. v. Sanitary Dist. of Chicago*, 367 Ill. 360, 369, 11 N.E.2d 361, 365 (1937); *Western Union Tel. Co. v. Martin*, 9 Ill.App. 587, 591-93 (1882); *Siegel v. Western Union Tel. Co.*, 312 Ill.App. 86, 92-93, 37 N.E.2d 868, 871 (1941); *Spangler v. Holthusen*, 61 Ill.App.3d 74, 80-82, 18 Ill.Dec. 840, 378 N.E.2d 304, 309-10 (1978). In *Siegel*, the plaintiff had delivered $200 to Western Union with instructions to transmit it to a friend of the plaintiff's. The money was to be bet (legally) on a horse, but this was not disclosed in the instructions. Western Union misdirected the money order and it did not reach the friend until several hours after the race had taken place. The horse that the plaintiff had intended to bet on won and would have paid $1650 on the plaintiff's $200 bet if the bet had been placed. He sued Western Union for his $1450 lost profit, but the court held that under the rule of *Hadley v. Baxendale* Western Union was not liable, because it "had no notice or knowledge of the purpose for which the money was being transmitted." 312 Ill.App. at 93, 37 N.E.2d at 871.

[1] The present case is similar, though Swiss Bank knew more than Western Union knew in *Siegel*; it knew or should have known, from Continental Bank's previous telexes, that Hyman-Michaels was paying the Pandora Shipping Company for the hire of a motor vessel named *Pandora*. But it did not know when payment was due, what the terms of the charter were, or that they had turned out to be extremely favorable to Hyman-Michaels. And it did not know that Hyman-Michaels knew the *Pandora's* owner would try to cancel the charter, and probably would succeed, if Hyman-Michaels was ever again late in making payment,

or that despite this peril Hyman-Michaels would not try to pay until the last possible moment and in the event of a delay in transmission would not do everything in its power to minimize the consequences of the delay. Electronic funds transfers are not so unusual as to automatically place a bank on notice of extraordinary consequences if such a transfer goes awry. Swiss Bank did not have enough information to infer that if it lost a $27,000 payment order it would face a liability in excess of $2 million. Cf. *Snell v. Cottingham*, 72 Ill. 161, 169-70 (1874); *Flug v. Craft Mfg. Co.*, 3 Ill.App.2d 56, 67, 120 N.E.2d 666, 671 (1954).

It is true that in both *Hadley* and *Siegel* there was a contract between the parties and here there was none. We cannot be certain that the Illinois courts would apply the principles of those cases outside of the contract area. As so often in diversity cases, there is an irreducible amount of speculation involved in attempting to predict the reaction of a state's courts to a new issue. The best we can do is to assume that the Illinois courts would look to the policies underlying cases such as *Hadley* and *Siegel* and, to the extent they found them pertinent, would apply those cases here. We must therefore ask what difference it should make whether the parties are or are not bound to each other by a contract. On the one hand, it seems odd that the absence of a contract would enlarge rather than limit the extent of liability. After all, under Swiss law the absence of a contract would be devastating to Hyman-Michaels' claim. Privity is not a wholly artificial concept. It is one thing to imply a duty to one with whom one has a contract and another to imply it to the entire world.

On the other hand, contract liability is strict. A breach of contract does not connote wrongdoing; it may have been caused by circumstances beyond the promisor's control—

a strike, a fire, the failure of a supplier to deliver an essential input. See *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 543-44, 23 S.Ct. 754, 755-56, 47 L.Ed. 1171 (1903). And while such contract doctrines as impossibility, impracticability, and frustration relieve promisors from liability for some failures to perform that are beyond their control, many other such failures are actionable although they could not have been prevented by the exercise of due care. The district judge found that Swiss Bank had been negligent in losing Continental Bank's telex message and it can be argued that Swiss Bank should therefore be liable for a broader set of consequences than if it had only broken a contract. But *Siegel* implicitly rejects this distinction. Western Union had not merely broken its contract to deliver the plaintiff's money order; it had "negligently misdirected" the money order. "The company's negligence is conceded." 312 Ill.App. at 88, 91, 37 N.E.2d at 869, 871. Yet it was not liable for the consequences.

Siegel, we conclude, is authority for holding that Swiss Bank is not liable for the consequences of negligently failing to transfer Hyman-Michaels' funds to Banque de Paris; reason for such a holding is found in the animating principle of *Hadley v. Baxendale*, which is that the costs of the untoward consequence of a course of dealings should be borne by that party who was able to avert the consequence at least cost and failed to do so. In *Hadley* the untoward consequence was the shutting down of the mill. The carrier could have avoided it by delivering the engine shaft on time. But the mill owners, as the court noted, could have avoided it simply by having a spare shaft. 9 Ex. at 355-56, 156 Eng.Rep. at 151. Prudence required that they have a spare shaft anyway, since a replacement could not be obtained at once even if there was no undue delay in carting the broken shaft to and the replacement shaft from the

manufacturer. The court refused to imply a duty on the part of the carrier to guarantee the mill owners against the consequences of their own lack of prudence, though of course if the parties had stipulated for such a guarantee the court would have enforced it. The notice requirement of *Hadley v. Baxendale* is designed to assure that such an improbable guarantee really is intended.

This case is much the same, though it arises in a tort rather than a contract setting. Hyman-Michaels showed a lack of prudence throughout. It was imprudent for it to mail in Chicago a letter that unless received the next day in Geneva would put Hyman-Michaels in breach of a contract that was very profitable to it and that the other party to the contract had every interest in canceling. It was imprudent thereafter for Hyman-Michaels, having narrowly avoided cancellation and having (in the words of its appeal brief in this court) been "put . . . on notice that the payment provision of the Charter would be strictly enforced thereafter," to wait till arguably the last day before payment was due to instruct its bank to transfer the necessary funds overseas. And it was imprudent in the last degree for Hyman-Michaels, when it received notice of cancellation on the last possible day payment was due, to fail to pull out all the stops to get payment to the Banque de Paris on that day, and instead to dither while Continental and Swiss Bank wasted five days looking for the lost telex message. Judging from the obvious reluctance with which the arbitration panel finally decided to allow the *Pandora's* owner to cancel the charter, it might have made all the difference if Hyman-Michaels had gotten payment to the Banque de Paris by April 27 or even by Monday, April 30, rather than allowed things to slide until May 2.

This is not to condone the sloppy handling of incoming telex messages in Swiss Bank's foreign department. But

Hyman-Michaels is a sophisticated business enterprise. It knew or should have known that even the Swiss are not infallible; that messages sometimes get lost or delayed in transit among three banks, two of them located 5000 miles apart, even when all the banks are using reasonable care; and that therefore it should take its own precautions against the consequences—best known to itself—of a mishap that might not be due to anyone's negligence.

We are not the first to remark the affinity between the rule of *Hadley v. Baxendale* and the doctrine, which is one of tort as well as contract law and is a settled part of the common law of Illinois, of avoidable consequences. See Dobbs, Handbook on the Law of Remedies 831 (1973); cf. *Benton v. J. A. Fay & Co.*, 64 Ill. 417 (1872). If you are hurt in an automobile accident and unreasonably fail to seek medical treatment, the injurer, even if negligent, will not be held liable for the aggravation of the injury due to your own unreasonable behavior after the accident. See, e.g., *Slater v. Chicago Transit Auth.*, 5 Ill.App.2d 181, 185, 125 N.E.2d 289, 291 (1955). If in addition you failed to fasten your seat belt, you may be barred from collecting the tort damages that would have been prevented if you had done so. See, e.g., *Mount v. McClellan*, 91 Ill.App.2d 1, 5, 234 N.E.2d 329, 331 (1968). Hyman-Michaels' behavior in steering close to the wind prior to April 27 was like not fastening one's seat belt; its failure on April 27 to wire a duplicate payment immediately after disaster struck was like refusing to seek medical attention after a serious accident. The seat-belt cases show that the doctrine of avoidable consequences applies whether the tort victim is committed. See Prosser, Handbook of the Law of Torts 424 (4th ed. 1971). Hyman-Michaels did both.

The rule of *Hadley v. Baxendale* links up with tort concepts in another way. The rule is sometimes stated in the

form that only foreseeable damages are recoverable in a breach of contract action. E.g., Restatement (Second) of Contracts § 351 (1979). So expressed, it corresponds to the tort principle that limits liability to the foreseeable consequence of the defendant's carelessness. See, e.g., *Neering v. Illinois Cent. R.R. Co.*, 383 Ill. 366, 380, 50 N.E.2d 497, 503 (1943). The amount of care that a person ought to take is a function of the probability and magnitude of the harm that may occur if he does not take care. See, e.g., *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947); *Bezark v. Kostner Manor, Inc.*, 29 Ill.App.2d 106, 111-12, 172 N.E.2d 424, 426-27 (1961). If he does not know what that probability and magnitude are, he cannot determine how much care to take. That would be Swiss Bank's dilemma if it were liable for consequential damages from failing to carry out payment orders in timely fashion. To estimate the extent of its probable liability in order to know how many and how elaborate fail-safe features to install in its telex rooms or how much insurance to buy against the inevitable failures, Swiss Bank would have to collect reams of information about firms that are not even its regular customers. It had no banking relationship with Hyman-Michaels. It did not know or have reason to know how at once precious and fragile Hyman-Michaels' contract with the *Pandora's* owner was. These were circumstances too remote from Swiss Bank's practical range of knowledge to have affected its decisions as to who should man the telex machines in the foreign department or whether it should have more intelligent machines or should install more machines in the cable department, any more than the falling of a platform scale because a conductor jostled a passenger who was carrying fireworks was a prospect that could have influenced the amount of care taken by the Long Island Railroad. See *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928); cf. *Ney v. Yellow Cab Co.*, 2 Ill.2d 74, 80-84, 117 N.E.2d 74, 78-80 (1954).

In short, Swiss Bank was not required in the absence of a contractual undertaking to take precautions or insure against a harm that it could not measure but that was known with precision to Hyman-Michaels, which could by the exercise of common prudence have averted it completely. As Chief Judge Cardozo (the author of *Palsgraf*) remarked in discussing the application of *Hadley v. Baxendale* to the liability of telegraph companies for errors in transmission, "The sender can protect himself by insurance in one form or another if the risk of nondelivery or error appears to be too great. . . . The company, if it takes out insurance for itself, can do no more than guess at the loss to be avoided." *Kerr S.S. Co. v. Radio Corp. of America*, 245 N.Y. 284, 291-92, 157 N.E. 140, 142 (1927).

But *Kerr* is a case from New York, not Illinois, and Hyman-Michaels argues that two early Illinois telegraph cases compel us to rule in its favor against Swiss Bank. *Postal Tel Cable Co. v. Lathrop*, 131 Ill. 575, 23 N.E. 583 (1890), involved the garbled transmission of two telegrams from a coffee dealer—who as the telegraph company knew was engaged in buying and selling futures contracts—to his broker. The first telegram (there is no need to discuss the second) directed the broker to buy 1000 bags of August coffee for the dealer's account. This got changed in transmission to 2000 bags, and because the price fell the dealer sustained an extra loss for which he sued the telegraph company. The court held that the company had had notice enough to make it liable for consequential damages under the rule of *Hadley v. Baxendale*. It knew it was transmitting buy and sell orders in a fluctuating market and that a garbled transmission could result in large losses. There was no suggestion that the dealer should have taken his own precautions against such mistakes. In *Providence-Washington Ins. Co. v. Western Union Tel. Co.*, 247 Ill. 84, 93 N.E. 134 (1910), a telegram from an insurance company cancel-

ing a policy was misdirected, and before it turned up there was a fire and the insurance company was liable on the policy. This was the precise risk created by delay, it was obvious on the face of the telegram, and the telegraph company was therefore liable for the insurance company's loss on the policy. Again there was no suggestion that the plaintiff had neglected any precaution. Both cases are distinguishable from the present case: the defendants had more information and the plaintiffs were not imprudent.

The legal principles that we have said are applicable to this case were not applied below. Although the district judge's opinion is not entirely clear, he apparently thought the rule of *Hadley v. Baxendale* inapplicable and the imprudence of Hyman-Michaels irrelevant. See 522 F.Supp. at 833. He did state that the damages to Hyman-Michaels were foreseeable because "a major international bank" should know that a failure to act promptly on a telexed request to transfer funds could cause substantial damage; but *Siegel*—and for that matter *Lathrop* and *Providence-Washington*—make clear that that kind of general foreseeability, which is present in virtually every case, does not justify an award of consequential damages.

We could remand for new findings based on the proper legal standard, but it is unnecessary to do so. The undisputed facts, recited in this opinion, show as a matter of law that Hyman-Michaels is not entitled to recover consequential damages from Swiss Bank.

Since Hyman-Michaels' complaint against Swiss Bank must be dismissed, Swiss Bank's third-party complaint against Continental Bank and Continental Bank's cross-claim against Hyman-Michaels are moot. That leaves only Hyman-Michaels' counterclaim against Continental Bank still to be considered. Although it puts us in the peculiar position of deciding a case between two citizens of Illinois

that involves only Illinois law, the counterclaim is within our ancillary jurisdiction. Continental Bank's complaint against Hyman-Michaels—a third-party defendant's complaint against the original plaintiff, arising out of the same transaction as the original suit, see Fed.R.Civ.P. 14(a)—is within that jurisdiction, *Mayer Paving & Asphalt Co. v. General Dynamics Corp.*, 486 F.2d 768, 772 (7th Cir. 1973), and Hyman-Michaels' counterclaim against Continental, being a compulsory counterclaim, did not require an independent federal jurisdictional basis and is therefore also within our ancillary jurisdiction.

[2] It is true that if Hyman-Michaels' claim against Continental had been based on Rule 14(a) rather than Rule 13(a), it would have required an independent federal jurisdictional basis. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978). But there is no inconsistency. A plaintiff cannot confer federal jurisdiction to decide a state-law claim by asserting such a claim under Rule 14(a) against a third-party defendant who is a citizen of the same state, when if he had sued that party originally he would have had to bring his entire suit in state court because complete diversity would have been lacking. See 437 U.S. at 374-75, 98 S.Ct. at 2402-03. But so far as appears Hyman-Michaels did not want to sue Continental Bank originally; it was induced to do so by Continental's claim against it. That claim was within the ancillary jurisdiction of the federal courts because, like a compulsory counterclaim, it arose out of the same transaction as Hyman-Michaels' claim against Swiss Bank, which was indirectly a claim against Continental via Swiss Bank's indemnity claim against Continental. See *Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co.*, 426 F.2d 709, 716 (5th Cir. 1970). And Hyman-Michaels' claim against Continental, which *was* a compulsory counterclaim, did not require an independent jurisdictional basis. See *Moore v. New*

York Cotton Exch., 270 U.S. 593, 46 S.Ct. 367, 70 L.Ed. 750 (1926). Continental may not invoke the jurisdiction of the federal courts in order to bring a state-law claim against a nondiverse party and then use the lack of diversity to force that party to bring its identical claim against Continental in a state court.

[3] On the merits, we agree with the district judge that Hyman-Michaels did not prove its case. Continental did not break any contract with Hyman-Michaels. All it undertook to do on April 25 was to transmit a telex message to Swiss Bank, and it did so. All it undertook to do on April 27, by the evidence of Hyman-Michaels' own confirming letter, was to advise its correspondent—that is, Swiss Bank—to "persist in attempting to make . . . payment," and it did so advise its correspondent. Nor was Continental negligent on either occasion. Its telex operator had used the machine in Swiss Bank's foreign department before, for the same purpose and without incident; he had no reason to expect a mishap. And Continental used due care in assisting Swiss Bank in the latter's vain hunt for the missing telex. The district court's findings on these issues were skimpy but the facts are clear and a remand is unnecessary.

No other issues need be decided. The judgment in favor of Hyman-Michaels against Swiss Bank is reversed with directions to enter judgment for Swiss Bank. The judgment in favor of Continental Bank on Swiss Bank's third-party complaint is vacated with instructions to dismiss that complaint as moot. The judgment dismissing Continental's cross-claim against Hyman-Michaels as moot, and the judgment in favor of Continental on Hyman-Michaels' counterclaim, are affirmed. The costs of the appeals shall be borne by Hyman-Michaels (Evra Corporation).

SO ORDERED.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 73 C 2643

EVRA CORPORATION, formerly known as
Hyman-Michaels Company, Plaintiff,

v.

SWISS BANK CORPORATION,
a Swiss corporation, Defendant and
Third-Party Plaintiff,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND
TRUST COMPANY OF CHICAGO,
a national banking association, Third-Party Defendant.

May 12, 1981.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ROSZKOWSKI, District Judge.

This matter comes before the court for a ruling following a bench trial beginning on August 18, 1980 and ending on August 28, 1980.

Plaintiff, EVRA Corporation, formerly known as Hyman-Michaels Company ("Hyman-Michaels"), brought this civil action against Swiss Bank Corporation ("Swiss Bank") for its failure to promptly make payment of an installment of ship charter hire in accordance with a telex request sent by Continental Illinois National Bank and Trust Company of Chicago ("Continental"). Hyman-Michaels' complaint alleges breach of contract negligence and breach of fiduciary duty.

Swiss Bank, pursuant to Rule 14(a) of the Federal Rules of Civil Procedure ("F.R.Civ.P."), joined Continental as a third-party defendant on the grounds that Continental is or may be liable to Swiss Bank for all or part of plaintiff's claim against it. Continental in turn filed a counterclaim against Hyman-Michaels, seeking recovery from Hyman-Michaels for all or part of the damages for which Continental might be found liable to Swiss Bank.

Hyman-Michaels, pursuant to Rules 13(a) and 14, F.R. Civ.P., filed a counterclaim against Continental for its alleged wrong-doing in connection with the transaction in question.[1] Hyman-Michaels seeks recovery from Continental under theories of negligence, breach of contract, and breach of fiduciary duty.

Jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1332.

After a thorough examination of the entire record of this action, the court makes the following Findings of Fact and Conclusions of Law.

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[1] On August 13, 1980, this court denied Continental's motion to dismiss the counterclaim filed by Hyman-Michaels, 496 F.Supp. 663. On August 18, 1980, Continental moved to have its counterclaim treated as an affirmative defense. This motion is pending before the court.

FINDINGS OF FACT[3]

In 1973, Hyman-Michaels was an Illinois corporation with its principal place of business at Chicago, Illinois. It was engaged in the international and domestic purchase and sale of scrap metals and oceanic freighter shipping.

In 1976, Hyman-Michaels sold its scrap metal business to Azcon Corporation and at the same time changed its name to EVRA Corporation.

Swiss Bank is a Swiss corporation with its principal office in Basle, Switzerland. It is a major international bank with offices throughout the world.

Continental is a national banking association with its principal place of business located in Chicago, Illinois. Continental is also a major international bank with offices throughout the world.

In April, 1972, Hyman-Michaels entered into a written contract to sell and deliver a quantity of steel scrap to a Brazilian corporation over a period of two years. The contract provided that the purchaser could decline to purchase scrap if its price exceeded a certain amount. Hyman-Michaels entered into a joint venture agreement with the Schiavone-Bonomo Corporation for the performance of the Brazilian contract under which Schiavone-Bonomo was to provide a portion of the steel scrap and Hyman-Michaels was to provide the ships to transport the scrap.

In June, 1972, Hyman-Michaels entered into a standard form time charter ("Charter") with the Pandora Shipping Company for a ship known as the "Pandora" intending, among other things, to use it in delivering the scrap metal under the Brazilian contract. The Charter was for one year, with two successive six-month options exercisable by Hyman-Michaels.

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[3] Any finding of fact which may be more properly termed a conclusion of law shall be deemed a conclusion of law.

The Charter rate for the vessel for the first twelve months was $1,825 a day, to be paid semi-monthly "in advance" to the account of Pandora Shipping Company at Banque de Paris et des Pays-Bas (Suisse) SA, Geneva, Switzerland ("Banque de Paris"). The daily Charter rates for the successive six-month option periods were $1,925 for the first six-month period and $2,050 for the second. The Charter provided that if Hyman-Michaels failed to pay the hire in advance, the owner was at liberty to withdraw the vessel from Hyman-Michaels' service.

The Pandora was delivered to Hyman-Michaels' service on July 27, 1972 at 2100 hours.

Hyman-Michaels made the payments of the first through fifth and eighth through eighteenth installments of the Charter hire by wire transfers. Each of the wire transfers was made through Continental. Continental used Swiss Bank as its correspondent bank for the wire transfers of the first, fourth, fifth and eighth through eighteenth installment payments. All of these wire transfers were sent to and received by Swiss Bank's telex machine 22235.

In each instance when a Charter installment payment was made through Continental, Hyman-Michaels received after requesting such payment a document from Continental entitled "Receipt Non-Negotiable" (hereinafter referred to as Continental's "advice form").

At the time Hyman-Michaels entered into the Charter, charter rates were at the bottom of the market. By October, 1972, however, charter rates had gone up dramatically. The sharp uptrend continued throughout the remaining period of the Charter and the Charter option periods.

Hyman-Michaels made the payments of the sixth and seventh installments of the Charter hire by checks sent in the mail. On October 30, 1972, the owner of the Pandora notified Hyman-Michaels that it was withdrawing the

Pandora from the Charter because the seventh installment payment, due on October 26, had not been received by Banque de Paris. This attempted withdrawal of the Pandora was submitted to a panel of three arbitrators in accordance with the Charter. On December 5, 1972, the panel ruled that the owner of the Pandora could not withdraw her from the Charter, but put Hyman-Michaels on notice that the payment provision of the Charter would be strictly enforced thereafter.

Subsequent to the arbitration proceeding, Hyman-Michaels reverted to the use of wire transfers exclusively for the payment of the Charter installments. Beginning with the eighth installment payment, the procedure followed by Hyman-Michaels was to have its accounting department make a request to Continental to effect a wire transfer a few days before each Charter hire payment was due.

By March, 1973, the price of steel scrap under Hyman-Michaels' contract with the Brazilian corporation rose to such a level that the Brazilian corporation elected not to purchase any more scrap. Hyman-Michaels thus had the opportunity to subcharter the vessel on the open spot market. Hyman-Michaels entered into a subcharter for the Pandora under which it was to be loaded with grain at Baton Rouge, Louisiana on April 28, 1973 for delivery to Poland.

At or about 9:17 A.M. on April 25, 1973, Carlos Oliveros, an employee of Hyman-Michaels, telephoned Continental and requested that Continental make a wire transfer in the amount of $27,040.62 to the account of the Pandora's owner at Banque de Paris for the Charter hire period of April 27—May 11, 1973. Payment of this installment was due at or before 2100 hours (9 P.M.) Geneva time on April 27, 1973.

The requested telex message was prepared by Continental in Chicago. It was then forwarded at 4:36 P.M. (Chicago time) by telex to Continental's London Branch for retransmittal to Swiss Bank in Geneva. The telex message requested that retransmission be addressed to Swiss Bank's telex machine 22235.

Continental issued its standard Continental advice form to Hyman-Michaels for the wire transfer and Hyman-Michaels received it at or before 8:30 A.M. of April 27, 1973. This advice form confirmed to Hyman-Michaels that its account had been debited for $27,040.62 and that Continental was proceeding to execute the wire transfer.

Beginning at about 9 A.M. (London time) on April 26, 1973, Brian Brown, a telex operator employed by Continental's London Branch, tried to transmit the April 25 telex instruction to Swiss Bank's general telex number 22235. After trying unsuccessfully for almost an hour to reach the general number, Brown diverted the telex message to Swiss Bank's telex machine 22226, a number he had used in the past, which was located in Swiss Bank's Foreign Exchange Department.

In retransmitting the April 25 message from Continental's London Branch to Swiss Bank's machine 22226,[8] Brown received Swiss Bank's "answer-back" at the beginning and at the end of the message. In between the two "answer-backs", Brown had a clear copy of the message on his telex machine in London. Accordingly, the court finds that on April 26, 1973, at approximately 9:52 A.M. Geneva time, Swiss Bank received the retransmission of the April 25 message on its telex machine 22226B.

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[8] Although Brown dialed telex number 22226, the message was automatically routed to machine 22226B, one of several machines available to receive a message when telex number 22226 is reached.

Prior to April 27, 1973, Continental's London Branch had diverted several cables from the general telex machines at Swiss Bank to those in Swiss Bank's Foreign Exchange Department. In 1973, the Foreign Exchange Department was located on the same floor as, and next door to the Cable Department, in which telex machine 22235 was located. Swiss Bank never complained to Continental's London Branch about diversion to telex machine 22226 in the Foreign Exchange Department and never notified Continental not to use it.

Swiss bank's foreign exchange room telex machines would receive an average of three to four telexes per week destined for other departments of the bank. Swiss Bank had no procedure for logging these telexes or insuring that they were promptly acted upon.

In April, 1973, Swiss Bank's telex machine 22226B was not equipped to make copies of telex messages which it received. In addition, it did not automatically shut off when it ran out of paper, but continued to receive messages which were not recorded in any manner.

Swiss Bank had no systematic method of checking the telex machines in the foreign exchange room to see if they had paper. The machines were operated by junior foreign exchange dealers who were not professional telex operators.

Swiss Bank took no action whatsoever in response to the April 26, 1973 telex from Continental's London Branch. The court finds that Swiss Bank either (a) lost the April 25, 1973 telex message, or (b) failed to have paper in its machine 22226B at the time that the message was being received, in which case no actual copy of the message would have been produced.

At about 8:30 A.M. (Chicago time) on Friday, April 27, 1973, Hyman-Michaels received a telex message from the

owner of the Pandora stating that the owner had withdrawn the vessel from service under the Charter because the nineteenth installment had not been paid to its account at Banque de Paris.

Between 8:45 A.M. and 9 A.M., Albert Moeng of Hyman-Michaels contacted Richard Beutel of Continental, advising him of the owner's claimed non-receipt. Hyman-Michaels instructed Continental to instruct its correspondent, Swiss Bank, to persist in attempting to effect the payment even in the face of a rejection by the owner's bank.

Hyman-Michaels telephoned the owner's representative on the morning of April 27, 1973 and told him that payment had been made. The owner persisted in his decision to withdraw and notified Hyman-Michaels that all further attempts to effect payment would be rejected.

Hyman-Michaels' admiralty counsel at Hill, Betts & Nash of New York City were informed of the situation early on April 27. They contacted the owner's attorneys and, through negotiations with them, reached an agreement that day for the submission of the dispute concerning the withdrawal of the Pandora to arbitration.

After his telephone conversation with Moeng of Hyman-Michaels, Beutel of Continental contacted Tom Jarom, who handled customer assistance matters in the International Banking Department of the Continental Bank (Chicago). Beutel informed Jarom of the details of the transaction and instructed him to find out what had happened to the payment of the nineteenth installment.

Jarom first located the underlying documentation for the payment instruction. He reported to Beutel that he had confirmed that on April 25, 1973, Continental had debited Hyman-Michaels' account for $27,040.62, had credited Swiss

Bank's account for the same amount, and had sent a payment instruction to its London Branch for retransmission to Swiss Bank (Geneva).

Thereafter, between 10:30 A.M. and 11:00 A.M. (Chicago time), Jarom contacted Swiss Bank by telephone. He inquired as to receipt of the telex and was advised that Swiss Bank had no record of its receipt. Jarom asked if he could carry out the transfer by giving Swiss Bank the tested telex code and payment instructions over the telephone, but the Swiss Bank employee told Jarom it was too late (it being approximately 6:00 P.M. in Geneva at that time).

Jarom reported the results of his investigation to Beutel and Beutel, in turn, reported what he had learned to Moeng.

No further action was taken by any of the parties on Saturday, April 28 or Sunday, April 29, 1973. On Monday, April 30, 1973, at about 10:00 A.M. (Chicago time), Beutel telephoned Continental's Geneva representative, Larry Gibb. Beutel told Gibb the details of the April 25 wire transfer and instructed Gibb to try and find out what had happened to it.

On May 1, 1973, Gibb contacted Alain Roux, the head of Swiss Bank's foreign relations and cables departments, and asked him to trace the message. Roux conducted a search of the cables department and found no evidence of receipt.

Later in the day on May 1, Gibb recontacted Roux and advised him that Continental's London Branch had diverted the telex to Swiss Bank telex 22226B. Upon learning that the telex had been sent to 22226B, Roux directed Pierre Andre Adler, head of Swiss Bank's foreign exchange department, to search his department's records for evidence of the telex. Adler made two searches of his department's

files, including a separate file for all garbled messages; but found no trace of the April 25 telex message.

On May 1, 1973, Roux suggested to Continental that it re-transmit the telex to 22235, which Continental did during the afternoon of that day. Swiss Bank re-transmitted the May 1, 1973 telex to Banque de Paris on May 2, 1973.

On May 8 and 14, 1973, arbitration hearings were held in New York City. On May 21, 1973, the arbitrators held that the owner was entitled to withdraw the Pandora from the Charter. With respect to the root cause of the withdrawal, the arbitrators stated as follows:

> However, the Panel is unanimously of the opinion that the root cause of this situation did not lie with Charterers, as very definite proof was shown to the Panel that payment was properly made by Charterers in sufficient time on April 25th A.M., through their Bank, Continental Illinois Bank of Chicago; further that this Bank acting properly and expenditiously in accordance with established proven practice, instructed their correspondent Bank (Swiss Bank Corporation) in Geneva, Switzerland, by telex in due time to make the said payment to Owners' bank in Geneva, but that Swiss Bank Corporation, having acknowledged the message by teletype (answerback automatically received by Continental Illinois Bank) thereupon lost the said instructions and failed to make payment when due on April 26th or April 27th. Charterers were only made aware of this matter upon receipt of a message from Owners on April 27th at 8:30 A.M. Chicago time, that vessel was being withdrawn for nonpayment of the 19th hire installment. Up to this point, the Panel regards Charterers as blameless and having properly executed their Charter Party commitments and obligations in this matter. (Bank error being beyond their control).

On July 5, 1973, the arbitrators' decision was confirmed by the United States District Court for the Southern District of New York.

CONCLUSIONS OF LAW[4]

This court has jurisdiction over this action under 28 U.S.C. § 1332.

The first question to be considered is whether Illinois law or Swiss law governs the determination of the issues in this case.

[1] In a diversity action, the choice of law rules of the state in which the district court is located apply. *Klaxon Co. v. Stentor Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 1021, 85 L.Ed. 1477 (1941). In Illinois, it is well established that the courts will look to the jurisdiction with the "most significant relationship" in determining the applicable law in tort cases. *Ingersoll v. Klein*, 46 Ill.2d 42, 45, 262 N.E.2d 593, 595 (1970); *Forty-Eight Insulations, Inc. v. Johns-Manville Products Corp.*, 472 F.Supp. 385, 391 (N.D.Ill.1979). Increasingly, Illinois courts have employed the "most significant relationship" approach in contract cases as well. *Ehrman v. Cook Electric Company*, 468 F.Supp. 98 (N.D.Ill. 1979).

[2] In determining which jurisdiction has the most significant relationship to a tort action, the court should consider: (1) the place of injury; (2) the place where the conduct causing injury occurred; (3) the domicile, place of incorporation, and place of business of the parties; and (4) the center of gravity of the parties' relationship. "[T]he contacts test is not an end in itself to be applied mechanically, but rather is a means reliably calculated to insure that the interests of the state with the most significant relationship to the occurrences will be protected." *Forty-Eight Insulations, supra*, at 391.

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[4] Any conclusion of law which may be more properly termed a finding of fact shall be deemed a finding of fact.

Plaintiff claims that Illinois law governs this entire action. Defendant Swiss Bank argues that some issues should be determined under Illinois law while others are more appropriately decided under Swiss law. Specifically, defendant claims that any liability it may have to plaintiff should be determined under Swiss law because Switzerland is the site of the alleged tort, defendant is located in Switzerland, and any relationship between defendant and plaintiff was created in Switzerland.

[3] In applying the "most significant relationship" test to the instant case, the court finds that Illinois law should govern all aspects of this action. Although Switzerland is the place where the conduct causing the injury occurred and is the defendant's place of business, all other elements point to Illinois. Both Hyman-Michaels and Continental are Illinois residents and conduct business in Illinois. The acts which resulted in Hyman-Michaels' loss were set in motion in Illinois. Illinois, as Hyman-Michaels' place of domicile, is the place where the alleged injury to plaintiff can be said to have occurred.

Finally, the center of gravity of the relationship between the parties is unquestionably Illinois. Hyman-Michaels, headquartered in Illinois, hired Continental in Illinois to make the transfer of funds necessary to effect the Charter payment. Because the payment had to be made in Switzerland, Continental used defendant Swiss Bank as its correspondent bank to transfer the funds by wire.

Illinois, as the place of incorporation and principal place of business of plaintiff, the principal place of business of third-party defendant Continental, and the center of the relationship of the parties, has the most significant relationship to this action with respect to all claims between the parties and with respect to the measure of any damages.

Plaintiff's complaint alleges breach of contract, negligence, and breach of fiduciary duty on the part of defendant Swiss Bank. Defendant claims that it owed no duty of care to plaintiff under either Swiss contract or tort law. Swiss law requires privity and thus precludes the imposition of liability to the owner on a correspondent bank.

[4] As discussed below, Illinois law does not require privity to establish the existence of a duty. It is undisputed, however, that a contract existed between plaintiff and Continental. Continental owed plaintiff a duty of care and Swiss Bank, as Continental's correspondent bank, owed plaintiff that same duty.

Although the Uniform Commercial Code ("U.C.C.") does not specifically address the problems of electronic fund transfers, courts have reasoned by analogy from concepts contained therein. In *Delbrueck & Co. v. Manufacturers Hanover Trust Company*, 609 F.2d 1047 (2d Cir. 1979), the court held that transfers of funds made via an electronic fund transfer system known as CHIPS (Clearing House Interbank Payments System) were irrevocable when made. The court found that the U.C.C. was not applicable to the case but stated that "analogous use of concepts such as the finality of checks once 'accepted' (§§ 3-410, 4-303) would support the irrevocability of these transfers." 609 F.2d at 1051.

An analogy may be drawn between the concept of "collecting bank" as found in Article 4 of the U.C.C. and Swiss Bank's role as a correspondent bank in the instant case. Under Section 4-201, a collecting bank's agency status with respect to the owner of an item is presumed prior to final

settlement of the item.[5] Similarly, a correspondent bank in a wire transfer transaction may be presumed to be an agent of the initiator of the transaction until such time as the transaction is completed. The court finds that Swiss Bank, as a correspondent bank in the subject transaction, was an agent of plaintiff and owed plaintiff the same duty of care as did Continental with whom plaintiff had an express contractual relationship.

[5] We turn now to plaintiff's negligence claim. Under Illinois law, a plaintiff in a negligence action must prove the existence of a duty owed by defendant to plaintiff, a breach of that duty, and an injury proximately resulting from the breach. The existence of such a duty is a question of law. *Cunis v. Brennan*, 56 Ill.2d 372, 308 N.E.2d 617 (1974).

[6] In determining whether a legal duty exists, the court must find that the occurrence involved was not simply foreseeable but that it was reasonably foreseeable. As stated by the Court in *Cunis:*

> . . . The creation of a legal duty requires more than a mere possibility of occurrence. Negligence as defined in the Restatement (Second) of Torts (1965), section 282, is conduct which falls below the standard established for the protection of others "against unreasonable risk of harm." Harper and James, in their Law of Torts, observe: "Not what actually happened, but what the reasonably prudent person would then have foreseen as likely to happen, is the key to the question of reasonableness." (2 Law of Torts (1956), sec. 16.9, at 929).

308 N.E.2d at 619.

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[5] U.C.C. § 4-201(1) provides in pertinent part:

> Unless a contrary intent clearly appears and prior to the time that a settlement given by a collecting bank for an item is or becomes final . . . the bank is an agent or subagent of the owner of the item. . . .

A collecting bank is "any bank handling the item for collection except the payor bank." U.C.C. § 4-105(d).

Other factors to be considered in determining whether a duty exists include "the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant. . . ." *Cross v. Chicago Housing Authority*, 74 Ill.App.3d 921, 925, 30 Ill.Dec. 544, 547, 393 N.E.2d 580, 583 (1st Dist. 1979).

[7] Plaintiff claims that Swiss Bank owed plaintiff a duty to transmit the wire transfer payment accurately and in a timely manner and that Swiss Bank breached that duty. Plaintiff contends that Swiss Bank negligently and carelessly failed to transmit the wire transfer payment in a timely manner after indicating that the telex message to transfer had been received on April 26, 1973.

Defendant argues that the injury suffered by plaintiff was not "reasonably foreseeable" because the telex machine employed by Continental to transmit the message in question is ordinarily used for foreign exchange transactions. Foreign exchange transactions require an interchange of information between Swiss Bank and the other party to the transaction. If a machine is out of paper, this interchange does not occur and there can be no damage to the customer. Defendant contends that, despite the fact that messages unrelated to foreign exchange transactions are received regularly on the foreign exchange machines, the unique facts of the subject occurrence were not foreseeable.

The court finds that defendant Swiss Bank owed a duty of care to plaintiff to maintain a system of receiving and disposing of telex messages upon which plaintiff could rely, and that Swiss Bank breached that duty. The first evidence of Swiss Bank's negligent procedures is the automatic answer back code on the telex machine in question, which continues to confirm the receipt of messages regardless of whether the content of the message is being recorded. The

fact that the machine is used primarily for foreign exchange transactions does not excuse defendant's negligent failure to monitor the paper supply of the machine.

Swiss Bank was also negligent in failing to institute a system for logging messages to insure that diverted messages (messages intended for other departments) were not lost or mishandled. Testimony by the head of Swiss Bank's foreign exchange department, Pierre Andre Adler, established that Swiss Bank failed to equip the machines in the foreign exchange department to produce carbon copies of incoming messages and also failed to adopt any system for registering diverted messages which would insure that they were sent to the correct department and properly acted upon. Such a cavalier attitude toward major transactions by a sophisticated international bank is shocking to the court.

The court rejects defendant's argument that three or four diverted messages per week is not sufficient notice of the potential risk involved to its non-foreign exchange customers. The evidence has shown that diverted messages may involve large sums of money and that, if such a message is lost or not acted upon promptly, the damages suffered by the initiator may be substantial.

The facts indicate an appalling lack of regard on the part of Swiss Bank for the more than reasonably foreseeable possibility that the negligent maintenance of its foreign exchange telex machines could result in substantial damage to one of its customers. The burden of guarding against such a possibility is minimal in view of the potential injury involved. As between Hyman-Michaels and Swiss Bank, the negligence and carelessness of Swiss Bank is the proximate cause of the loss suffered by plaintiff Hyman-Michaels.

Plaintiff also alleges breach of fiduciary duty on the part of defendant Swiss Bank. Plaintiff has failed to prove, however, the existence of such a duty.

[8, 9] The courts have invariably held that a fiduciary relationship exists only when confidence is reposed on one side and there is a resulting superiority and influence on the other side. *People ex rel. Barrett v. Central Republic Trust Co.*, 300 Ill. App. 297, 302-03, 20 N.E.2d 999, 1001-02 (1st Dist. 1939). Although plaintiff may have reposed confidence in Swiss Bank to the extent that anyone reposes trust and confidence in a commercial bank, there is no evidence that Swiss Bank exercised any superiority or influence over plaintiff. Swiss Bank's role in the transaction was that of correspondent bank to Continental and, as such, its relationship to plaintiff was governed solely by the contractual relationship which existed between plaintiff and Continental. Accordingly, the court finds that Swiss Bank did not breach any fiduciary duty to Hyman-Michaels in connection with Swiss Bank's failure to properly handle the telex payment order.

SWISS BANK'S THIRD-PART COMPLAINT

Swiss Bank filed a third-party complaint against Continental alleging that it is entitled to indemnity from Continental for any damages imposed on Swiss Bank in favor of plaintiff. Swiss Bank claims that Continental's actions were the primary and proximate cause of any loss or damage suffered by Hyman-Michaels in that: (1) Continental should have recommended a payment procedure to Hyman-Michaels that would have allowed more lead time for payment of the charter installment; (2) Continental carelessly and negligently sent the telex message of April 26, 1973 to the wrong telex machine; and (3) Continental was careless

and negligent in its actions subsequent to being advised on April 27, 1973 that the charter installment payment had not been made to the owner's account.

Third-party defendant Continental argues that, in order to prevail against Continental, Swiss Bank must prove as a matter of law (1) that Swiss Bank's negligence was only passive negligence and (2) that Continental's conduct constituted active negligence such that it was the major cause of the injury sustained by plaintiff.

At the time this case arose, no contribution among tortfeasors was allowed in Illinois.[6]

In *Carver* v. *Grossman*, 55 Ill.2d 507, 305 N.E.2d 161, 163 (1973), the court observed: "Where indemnity has been allowed the conduct of the indemnitor has usually been characterized as the primary cause or active negligence while that of the indemnitee has been characterized as the secondary cause or passive negligence." Although no precise definition of the term "active" negligence has been articulated by the Illinois courts, the facts of *Carver* clearly illustrate what is contemplated by the use of the term.

Plaintiff Carver was employed by a gasoline service station. The owner of the station, Bishop, drove the automobile of a customer into a service bay and instructed

[6] The law changed subsequent to 1973. *Skinner v. Reed-Prentice Division Package Machinery Co.*, 70 Ill.2d 1, 15 Ill.Dec. 829, 374 N.E.2d 437 (1978), permitted contribution among joint tortfeasors. In 1979, the Illinois legislature codified *Skinner* by expressly permitting actions for contribution among joint tortfeasors. The new Illinois statute and *Skinner* only apply, however, to causes of actions arising out of occurrences on and after March 1, 1978. *Ill.Rev.Stat.*, ch. 70, § 301 *et seq.* (1979); 70 Ill.2d at 17, 15 Ill.Dec. 829, 374 N.E.2d 437. Consequently, the only theory upon which Swiss Bank can recover damages from Continental is the theory of implied indemnity.

Carver to change the oil and the oil filter. When Bishop got out of the car, he turned the engine off, but left the transmission in gear and the keys in the ignition.

As Carver stood in front of the car, working under the hood, Bishop told the owner of the car to check his gas. The owner turned on the ignition and the car started and lurched forward, pinning Carver and causing him injuries.

Carver brought a common law negligence action against Grossman as administrator of the automobile owner's estate. Grossman filed a third-party complaint against Bishop, the employer, based on an implied indemnity theory. The complaint alleged that if the owner's estate was held liable to the original plaintiff, then the estate was entitled to full indemnification from Bishop because Bishop had been actively negligent and the owner had been passively negligent.

The trial court entered judgment against Bishop, the third-party defendant, in favor of Grossman, the third-party plaintiff, for the amount of a consent judgment previously entered against Grossman in favor of the original plaintiff. The Appellate Court affirmed. The Illinois Supreme Court reversed and remanded with directions, stating:

> We feel that the evidence in this case fails to establish Grossman's right to indemnity from Bishop, the owner of the service station, because the evidence clearly establishes that his decedent, Putnam, was himself guilty of active negligence.
>
> * * * * * *
>
> It was the negligent act of Putnam in starting the engine while the car was in gear without depressing the clutch or applying the brake that caused the car to move forward and strike Carver. We cannot character-

> ize this negligence as passive so as to permit the shifting of the entire responsibility from him to Bishop for injuries to which he very substantially contributed. It cannot be said that the principal or moving cause of the injury was the act of Bishop and that Putnam simply failed to discover or correct the situation which Bishop had created. Nor can Bishop be said to be the "principal wrongdoer" or the one whose wrong has been principally responsible for the injury. (Citations omitted)

305 N.E.2d at 163-164.

[10] The evidence in this case has failed to establish Swiss Bank's right to indemnification from Continental. Regardless of whether Continental had advised Hyman-Michaels to allow more lead time in initiating the charter installment payment, and Hyman-Michaels had in fact initiated the payment sooner, Swiss Bank's negligent procedures would have precluded either party from becoming aware of the non-payment until notification by the owner. Similarly, Continental's decision to retransmit the April 25 telex instruction to the machine in Swiss Bank's Foreign Exchange Department can hardly be characterized as the "primary cause" of plaintiff's injuries. The telex machine in question "answered back" that the message had been received. Once that transmittal was confirmed, Continental no longer had any control over the payment. There is no question that, but for Swiss Bank's negligence, Hyman-Michaels' losses would not have occurred.

The court finds that Continental's actions subsequent to April 27, 1973 are irrelevant. The facts simply do not allow the court to characterize Swiss Banks negligence as passive so as to permit the shifting of the entire responsibility for plaintiff's injuries to Continental.

THE COUNTERCLAIMS

Continental filed a counterclaim against Hyman-Michaels seeking recovery from Hyman-Michaels for all or part of the damages for which Continental might be found liable to Swiss Bank.[1] Continental, as well as Swiss Bank, contends that Hyman-Michaels is barred from recovery by its contributory negligence and assumption of the risk of delays.

[11] Defendants argue that the fact that plaintiff was previously involved in an arbitration proceeding, at which time it was put on notice that the payment provision of the Charter would be strictly enforced, required that plaintiff allow sufficient lead time in which to make the Charter payment. Defendants claim that because plaintiff knew that errors and delays may occur in the transmission of telex messages, plaintiff should have allowed even more lead time in making the Charter payment than the three days actually allowed.

The court concludes that plaintiff was not guilty of contributory negligence as a matter of law. The evidence shows that plaintiff initiated payment of the Charter installment at or about 9:17 A.M. on April 25, 1973, thereby allowing a three business day lead time for completion of the transaction. Plaintiff telephoned Continental at the aforementioned time and requested that a wire transfer of the funds be made to the account of the Pandora's owner at Banque de Paris. Payment of the installment was due at or before 2100 hours (9 P.M.) Geneva time on April 27, 1973.

The testimony at trial established that telex communication is essentially instantaneous. Although Continental waited until 4:36 P.M. (Chicago time) to send the telex message to its London branch for retransmission to Swiss

[1] Continental's motion to have its counterclaim treated as an affirmative defense is denied.

Bank, the message still reached London in time for the start of business on April 26.

Continental's London Branch retransmitted the telex message from Continental to Swiss Bank on the morning of April 26, 1973 and, according to the "answer-backs" received by Continental's London Branch operator, Swiss Bank received the retransmission at approximately 9:52 A.M. Geneva time. Swiss Bank had most of the business day of April 26 and all of April 27 in which to transmit the telex to Banque de Paris.

The court finds that three days was sufficient lead time for completion of the transaction in question. There is no evidence that a longer lead time would have insured a different outcome, given the customary procedures of the defendant banks. Continental issued its standard advice form to plaintiff confirming that plaintiff's account had been debited for the requested amount and that Continental was proceeding to execute the wire transfer.

Hyman-Michaels was entitled to assume that Continental and any correspondent bank employed by Continental would use due care in carrying out the transaction. Hyman-Michaels did not employ and was not obligated to employ a confirmation procedure independent of any employed by the banks executing the transaction. Consequently, Hyman-Michaels first learned of the non-receipt of the funds when notified by the owner of the Pandora of the withdrawal on April 27, 1973. Even with a longer lead time, plaintiff still would not have learned of the non-receipt of the nineteenth installment until notified by the owner on April 27.

Defendants also allege that Hyman-Michaels' claim is barred by the exculpatory provision on the reverse side of the Continental advice form. Plaintiff claims that it never signed or otherwise agreed to the supposed exculpatory

clause and that, in any event, the language in question applies only to Continental and not to liability asserted against its correspondent, Swiss Bank.[3]

[12] Under Illinois law, a court need not enforce a contractual clause exempting a party from liability for its own negligence unless "it is clear from the contract that the parties' intent was to shift the risk of loss" and it would not be against the "settled public policy of the state to do so...." *Rutter v. Arlington Park Jockey Club*, 510 F.2d 1065 (7th Cir. 1975); *citing Jackson v. First National Bank*, 415 Ill. 453, 460, 114 N.E.2d 721, 725 (1953).

[13] After considering all the evidence, the court finds that there was no intent on the part of Hyman-Michael's to shift the risk of loss. The transaction in question was consummated over the telephone. Continental's advice form was merely a confirmation that the transaction had been carried out as requested. None of the employees or officers of Hyman-Michaels ever signed the advice form and there is no evidence that the exculpatory clause was ever brought to their attention.

Although Illinois courts have often upheld exculpatory clauses relieving a party from liability for negligence in performing a contractual obligation, the cases involve agreements signed by both parties in which the intent to accept such a clause is clear. *See e. g., Rutter v. Arlington Park*

---

[3] The clause in question provides as follows:

> It is fully understood and agreed that no liability shall attach to the Continental Illinois National Bank and Trust Company of Chicago (hereinafter referred to as Bank), nor to its correspondents, for any loss or damage occasioned by delay in, failure of, or error in cable, telegraph, or telex transmission of messages, or error in identification of payee, or by acts or omissions of correspondents or agencies employed by the Bank, or for any cause beyond Bank's reasonable control.

Jockey Club, supra; Morrow v. Auto Championship Racing Association, Inc., 8 Ill.App.3d 682, 291 N.E.2d 30 (1972); *Owen v. Vic Tanny's Enterprises*, 48 Ill.App.2d 344, 199 N.E.2d 280 (1964).

Continental's advice form may be likened to an adhesion contract in which a consumer has no choice but to accept an exculpatory provision. Because the exculpatory clause is part of a standard form contract, its validity is open to question. In the instant case, however, the court finds only that Hyman-Michaels' claim is not barred by the exculpatory clause of the advice form because there is no evidence that Hyman-Michaels was aware of or accepted that provision of the contract.

In response to Continental's counterclaim, Hyman-Michaels filed a counterclaim against Continental, alleging negligence, breach of contract, and breach of fiduciary duty. As previously discussed, the court finds no liability on the part of Continental for any injury suffered by plaintiff in this action.

DAMAGES

The final issue to be resolved is the extent of the damages to which plaintiff is entitled. Plaintiff claims it is entitled to profits lost as a result of the withdrawal of the Pandora, as well as costs and attorney's fees for the 1973 arbitration. Defendant Swiss Bank argues that it should not be held accountable for damages which it could not have foreseen.

Swiss Bank contends that, under contract theory, the lost profits claimed by Hyman-Michaels are consequential or special damages. Swiss Bank relies on the traditional rule first announced in *Hadley v. Baxendale*, 9 Exch. 341 (1854). In *Hadley*, the Court of Exchequer held that consequential damages may include only those "as may reasonably be

supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." Because Swiss Bank did not know the details of the transaction in question, it claims that Hyman-Michaels should be denied lost profits as part of the damages awarded.

[14, 15] Lost profits are an appropriate item of damages where there is a causal connection between defendant's conduct and plaintiff's injury and where the amount of the damages can be determined with reasonable certainty. *See Mercury Cleaning Systems, Inc. v. Manitowoc Engineering Corp.*, 255 F.2d 318 (7th Cir. 1958). As discussed above, the conduct of Swiss Bank was clearly the proximate cause of plaintiff's injury. The expert testimony of plaintiff's witness, Haas, demonstrated to the court's satisfaction that plaintiff's lost profits can be calculated with reasonable certainty. Thus, plaintiff is entitled to damages for the profits it lost due to the withdrawal of the Pandora.

Swiss Bank's argument that the extent of plaintiff's injury was not foreseeable is unpersuasive. The fact that plaintiff was transferring funds by wire rather than through the mail was sufficient to alert Swiss Bank to the importance of the transaction. In addition, Swiss Bank was aware of the fact that the telex machines in the Foreign Exchange Department were receiving three or four diverted messages per week which could involve large sums of money. Swiss Bank, as a major international bank, could reasonably foresee that failure to act promptly upon receipt of such a telex message could result in substantial damage to a customer of the bank.

[16] Swiss Bank also claims that the proper measure of damages for the loss of the Pandora is the replacement cost of the vessel. Swiss Bank argues that Hyman-Michaels could have substantially reduced its losses if it had hired

a vessel to replace the Pandora, and that Hyman-Michaels had a duty to do so.

Hyman-Michaels claims that it has no duty to cover or mitigate where to do so creates a substantial risk of further damages. In addition, plaintiff claims that defendants' computation of damages, using a replacement cost analysis, greatly undervalued plaintiff's damages.

In *Toyota Industrial Trucks U.S.A., Inc. v. Citizens National Bank of Evans City*, 611 F.2d 465 (3rd Cir. 1979), one of the issues before the court was whether a seller is required to mitigate any damages it incurs by virtue of a wrongful dishonor of drafts submitted pursuant to a letter of credit. In discussing the concept of "duty to mitigate", the court stated:

> The term "duty to mitigate" damages has been interpreted to mean that "damages which the plaintiff might have avoided with reasonable effort without undue risk, expense, or humiliation are either not caused by the defendant's wrong or need not have been, and therefore, are not to be charged against him." 11 Williston on Contracts, § 1353 at 274 (3d ed. 1968). When mitigation is appropriate, the test to be applied to the plaintiff's conduct is whether the conduct taken in response to the defendant's breach was reasonable. (Citations omitted). Reasonable conduct "is to be determined from all the facts and circumstances of each case, and must be judged in the light of one viewing the situation at the time the problem was presented." (Citations omitted).

611 F.2d at 471.

The evidence has shown that Hyman-Michaels would have assumed a substantial additional risk had it undertaken to charter a replacement vessel at the time it lost the Pandora. By April of 1973, shipping rates were one hundred percent higher than they had been when plaintiff entered into the Pandora charter. Although the rates, in fact, con-

tinued to increase for a period of time after April of 1973, plaintiff's decision not to re-charter was reasonable at the time the problem was presented. Because of the undue risk involved, plaintiff was under no duty to mitigate damages.

[17] Hyman-Michaels also seeks to recover $15,952.65 in attorneys' fees which it incurred in the second arbitration proceeding. Defendant claims that plaintiff is not entitled to recover these fees. Defendant relies on *Garris v. Schwartz*, 551 F.2d 156, 159 (7th Cir. 1977), which held that "as a general rule under Illinois law, attorneys' fees and expenses are not recoverable as an element of damages in a suit brought to enforce a common law duty" unless plaintiff's complaint fits a recognized exception to that rule.

Plaintiff in *Garris* was attempting to recover fees incurred in litigation, caused by defendant, between plaintiff and a third party. The court found that recent decisions of the Illinois Appellate Court extended the general rule quoted above to exclude recovery of attorneys' fees and expenses incurred in litigation with third parties. 551 F.2d at 158.

A recent Illinois Appellate Court case specifically rejects the interpretation of Illinois law set forth in *Garris*. In *Sorenson v. Fio Rito*, 90 Ill.App.3d 368, 45 Ill.Dec. 714, 718-19, 413 N.E.2d 47, 51-52 (1st Dist., 1980), the court held that plaintiff could recover her attorneys' fees, stating:

> The general rule in Illinois is that one who commits an illegal or wrongful act is liable for all of the ordinary and natural consequences of his act. (*Philpot v. Taylor*, (1874), 75 Ill. 309; *Bimba Mfgr. Co. v. Starz Cylinder Co.* (1969), 119 Ill.App.2d 251, 256 N.E.2d 357; 15 Ill.L. & Prac. *Damages*, § 32 (1968).) Logically, this would include any attorneys' fees expended in bringing a lawsuit against the wrongdoer. However, because it was felt that the allowance of attorneys' fees would deter

a litigant from prosecuting or defending an uncertain claim, the "American Rule" was adopted as an exception to the general rule. The Supreme Court stated the rationale for the "American Rule" as follows:

> In support of the American Rule, it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel. *Fleischmann Distilling Corp. v. Maier Brewing Co.* (1967), 386 U.S. 714, 718 [87 S.Ct. 1404, 1407, 18 L.Ed.2d 475].

It is clear from this statement that the policy against awarding attorneys' fees was intended to apply only where a successful litigant seeks to recover his costs in maintaining the lawsuit. *We do not believe it was intended to preclude a plaintiff from recovering losses directly caused by the defendant's conduct simply because those losses happen to take the form of attorneys' fees.* The plaintiff here is not attempting to recover the attorneys' fees she expended in bringing this lawsuit. Rather, she seeks to recover losses incurred in trying to obtain refunds of tax penalties which were assessed against her solely as a result of the defendant's negligence. Had the plaintiff been forced to hire an accountant to repair the damage caused by the defendants' conduct, she would undoubtedly have been entitled to recover the accountant's fee as an ordinary element of damages. There is no basis in logic for denying recovery of the same type of loss merely because the plaintiff required an attorney instead of an accountant to correct the situation caused by the defendant's neglect. In holding the defendant liable for the plaintiff's losses, we are not violating the policy against 'penalizing' a litigant for defending a lawsuit. We are simply following the general rule of requiring a wrongdoer to bear the consequences of his misconduct. (Emphasis added).

The reasoning of *Sorenson* is particularly applicable to the instant case. Hyman-Michaels is not seeking to recover

attorneys' fees incurred in this litigation. Rather, Hyman-Michaels is seeking to recover all the damages it suffered as a result of Swiss Bank's negligence. The attorneys' fees incurred by Hyman-Michaels in the second arbitration are an appropriate part of those damages and are not unreasonable in view of the amount of work involved.

Finally, Hyman-Michaels is entitled to one hundred percent of its damages. There is no evidence that the Pandora was part of the joint venture agreement between Hyman-Michaels and Schiavone-Bonomo or that such was even the intent of the parties.

Accordingly, it is ordered that judgment be and the same is hereby entered in favor of plaintiff Hyman-Michaels and against Swiss Bank in the amount of Two Million One Hundred Thirty Seven Seven Hundred Thirty One and 65/100 Dollars ($2,137,731.65) plus costs.*

---

*Loss of net earnings was computed by Hyman-Michaels as follows:

M/V PANDORA—LOSS DUE TO WITHDRAWAL OF VESSEL

Cost if Charter had continued		$ 894,650
Earnings if Charter had continued*		
5/30-7/29 61 days at $5000 =	$ 305,000	
7/30-9/29 62 days at $5967 =	369,954	
9/30-11/29 61 days at $6040 =	368,440	
11/30-1/29/74 61 days at $7100 =	433,100	
1/30-3/29 59 days at $6710 =	395,890	
3/30-8/27 151 days at $7570 =	1,143,070	
Total estimated revenue		$3,015,454
Loss of net earnings		$2,120,804

* Estimated daily revenue is based on actual reported fixtures on roundtrips for the dates corresponding to the above periods. The fixtures were reported in the Maritime Research, Inc. Bulletin with the exception of the last period (3/30-8/27 1974) which is based on Hyman-Michaels charter of the M/V STOMOLEON for a period of 6 months.

Total amounts of damages caused by loss of Pandora:

Lost profits	$2,120,804.00
Attorney's fees for 1973 arbitration	15,952.65
Fees paid for arbitration	975.00
	$2,137,731.65

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

CORRECTED—June 24, 1982
June 23, 1982

Before

Hon. LUTHER M. SWYGERT, Senior Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge

EVRA CORPORATION, formerly HYMAN-MICHAELS COMPANY,
Plaintiff-Appellee and
Counterplaintiff-Appellant,

vs.

Nos. 81-1925
81-1926

SWISS BANK CORPORATION,
Defendant-Appellant and
Third-Party-Plaintiff-Appellant,

vs.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,
Third-Party-Defendant-Appellee and Counterdefendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 78-C-2643

Stanley J. Roszkowski, *Judge.*

ORDER

On April 16, 1982, EVRA Corporation filed a petition for rehearing with suggestion for rehearing en banc. All of the judges of the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the petition.* The petition is therefore DENIED.

* Chief Judge Walter J. Cummings and Circuit Judge Richard D. Cudahy did not participate in the consideration of the suggestion for rehearing en banc.

No. 82-507

Office - Supreme Court, U.S.
FILED
OCT 22 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

EVRA CORPORATION, formerly known as Hyman-Michaels Company,

Petitioner,

v.

SWISS BANK CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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October 22, 1982

QUESTIONS PRESENTED

1. Is Petitioner entitled to a review by this Court of a determination by the Circuit Court sitting in Illinois that under the governing law of Illinois the traditional rule of *Hadley* v. *Baxendale,* that consequential damages will not be awarded unless the defendant was put on notice of the special circumstances giving rise to them, governed a claim of consequential damages resulting from a failure to effect promptly a wire request for transfer of funds, regardless of whether the plaintiff sued in tort or contract?

2. Is Petitioner entitled to a review by this Court of the Circuit Court's determination that on the undisputed facts respondent was not, as a matter of Illinois law, put on notice of the special circumstances giving rise to the consequential damages for which petitioner had sued?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	1
OPINIONS BELOW	1
STATEMENT OF THE CASE	2
The Nature of the Case	2
Proceedings Below	5
REASONS FOR DENYING THE WRIT	7
I. None of the Traditional Reasons for the Granting of Petitions for a Writ of Certiorari Are Set Forth in the Petition	7
II. The Court of Appeals Correctly Determined That the Rule of *Hadley* v. *Baxendale* Applied to This Case Under Applicable State Law	10
A. The Illinois law applied by the Court of Appeals does not "insulate" banks from liability in electronic funds transfers	10
B. The state law authorities unanimously support application of the *Hadley* rule to the facts of this case	12
C. The Court of Appeals properly interpreted the rule of *Hadley*	16
III. The Court of Appeals Did Not Disregard the District Court's Findings of Facts	18
CONCLUSION	24

TABLE OF AUTHORITIES

PAGE

Cases:

Aircraft Products Co. v. Universal Oil Products Co., 100 Ill. App. 3d 694, 427 N.E.2d 585 (1st Dist. 1981) 21

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PAGE

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United States v. Hill Lines, Inc., 175 F.2d 770 (5th Cir. 1949) 20
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PAGE

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United States Code
28 U.S.C. § 2106 (1977) 10

Uniform Commercial Code
§4-201 16

Rules of the Supreme Court of the United States
Rule 17 9

Federal Rules of Civil Procedure
Rule 52(a) 9

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Ill. Rev. Stat. ch. 16½ §106 (1973) 3
Ill. Rev. Stat. ch. 26 §4-103(5) (1979) 15

Restatements:

Restatement (First) of Contracts
§330 (1932) 16, 17

Restatement (Second) of Contracts
§351 (1981) 18
§351(2) (1981) 17
§351(2)(b) (1981) 17

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Healy, *Termination of Charter Parties*, 49 Tul. L. Rev. 845 (1975) 5

Annot., *Liability of Correspondent Bank to Depositor in Forwarding Bank for Breach of Duty as to Collection of Paper*, 58 A.L.R. 764 (1929) 16

No. 82-507

IN THE

Supreme Court of the United States

October Term, 1982

EVRA CORPORATION, formerly known as Hyman-Michaels Company,

Petitioner,

v.

SWISS BANK CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals reversing the decision below is reported at 673 F.2d 951 (7th Cir. 1982), and is duplicated as Appendix A to the petition. The decision of the District Court is reported at 522 F. Supp. 820 (S.D. Ill. 1981), and is duplicated as Appendix B to the petition.

STATEMENT OF THE CASE

The Nature of the Case

This diversity action was brought by Evra Corporation, formerly Hyman-Michaels Company ("Hyman-Michaels"), at all relevant times an Illinois scrap iron dealer, to recover $2.1 million in profits which Hyman-Michaels might have made on the unanticipated rise in the value of a ship charter which Hyman-Michaels lost following the late payment of a charter installment in April 1973. Hyman-Michaels sued Swiss Bank Corporation ("SBC"), a Swiss corporation with its principal offices in Switzerland, alleging that Hyman-Michaels' claimed losses were attributable to SBC's failure, in Geneva, to effect promptly a request by wire to transfer funds when it received that wire transfer request from the London office of Hyman-Michaels' bank, Continental Illinois Bank and Trust Company ("Continental").* A-2.

The payment in question was to have been made to the owner of the vessel at its bank (Banque de Paris et des Pays-Bas (Suisse) S.A. ("Banque de Paris")) in Geneva. Hyman-Michaels initiated the wire transfer process by a direction to its bank, Continental, which in turn requested SBC to effect the transfer in Geneva. A-2. SBC's role was thus as an involuntary relay, to transfer funds to Banque de Paris in Switzerland when it received a request

* Continental did not become a party to the suit until it was impleaded by SBC. Continental thereafter cross-claimed against Hyman-Michaels and Hyman-Michaels counterclaimed against Continental. A-6. Hyman-Michaels does not seek review of the Court of Appeals' decision affirming judgment for Continental on Hyman-Michaels' claim against it.

from Continental to do so. SBC's involvement in the transfer arose solely from its correspondent banking relationship with Continental.* SBC had no direct relationship with Hyman-Michaels and knew nothing of Hyman-Michaels or its business. Its only knowledge concerning Hyman-Michaels' charter was what could be derived from the telex Continental directed to it—namely, that the payment requested by the telex was for the hire of a vessel for a two-week period. Specifically, SBC did not know the length of Hyman-Michaels' charter of the Pandora, the date payment was due, the provisions of the charter for termination if payment was late, or the history of the charter, which made it of such great value to Hyman-Michaels and which put the charter at risk in the event of any delay in payment. A-10-11.

Hyman-Michaels had entered into the charter for the vessel Pandora in June 1972, when charter rates were very low, for the purpose of hauling scrap. By early 1973, charter rates had risen dramatically and, when its commitment to haul scrap was cancelled, Hyman-Michaels began chartering the Pandora in the spot market at rates substantially above the charter rate. A-2-3, A-6.

Under the terms of the charter, charter payments were due semi-monthly in advance. A-2. While Hyman-Michaels had made the first eight charter payments by wire, thereafter it sent several payments by mail, knowing that those payments would arrive late in Geneva. On the second such occasion, the Pandora's owner attempted to withdraw the vessel from the charter. A-3. The matter was submitted to

* Indeed, its only "contact" with Illinois was its correspondent relationship with Continental. At the time SBC had no office in Illinois and was prohibited by Illinois law from doing business in Illinois. *See* Ill. Rev. Stat. ch. 16½ § 106 (1973).

arbitration where a divided panel declined to permit the owner to withdraw the ship but warned that the termination provisions of the charter would be strictly enforced thereafter. A-3, A-13.

Hyman-Michaels then resumed sending payments by wire transfer. It initiated payment for the time period April 27 through May 11, 1973 on April 25, 1973. Payment for the period was due either at midnight April 26, 1972, as the owner argued, or at the latest at 9:00 p.m. on April 27, 1972, the anniversary date of the charter. *See* A-4. Hyman-Michaels learned early on the morning of April 27 that payment had not been received by the owner's bank, and that the owner was attempting to withdraw the vessel from the charter. It instructed Continental to "persist" in attempting to effect payment. It neither directed that a duplicate payment be made nor took steps to have payment made immediately by other means. It was not until May 1, 1973, when it was clear the initial telex had been lost, that Continental, at SBC's request, re-sent the telexed instructions to SBC, with the transfer of funds to Banque de Paris taking place the following day. A-5.

The issue of the owner's right to withdraw the vessel from the charter was then submitted to arbitration. (A copy of the panel's decision is duplicated in the Appendix to this brief at RA-1-5.) The unanimous decision of the arbitration panel, that the owner could withdraw the vessel from the charter, rested on the panel's finding that Hyman-Michaels had not acted with diligence in attempting to effect payment after it learned that the owner had not received payment on the morning of April 27. A-5-6. The panel found that while Hyman-Michaels was "blameless" for the

initial delay arising from SBC's loss of the telexed instructions, when faced with a delay in payment, it did not do what was required of it to remedy the situation. The arbitrators held that Hyman-Michaels could have effected payment almost immediately by at least two methods—an immediate duplicate payment or a banker's check delivered by hand or special messenger. But, held the panel, "this was not done and Charterers relied upon the Continental Illinois Bank to find and rectify the delayed payment." In the panel's view it was Hyman-Michaels' acts which "therefore, created the opening that owners were seeking to withdraw" from the Charter.* RA-4.

Proceedings Below

Following a bench trial in which Hyman-Michaels sought recovery from SBC on negligence, contract and breach of fiduciary duty theories, the District Court held SBC liable for Hyman-Michaels' lost profits of about $2.1 million and some incidental expenses incurred in the second arbitration. Although the District Court seemed to rest its findings of liability on a tort theory, it apparently viewed the relationship between SBC and Hyman-Michaels as being essentially contractual in nature. Thus it stated: "[i]t is undisputed, however, that a contract existed between plaintiff and Continental. Continental owed plaintiff a duty of care and Swiss Bank, as Continental's correspondent bank, owed plaintiff that same duty." B-13.

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* The panel's initial decision had stated "This being the second such default and the second arbitration under this charter party for the same cause, the charterers cannot be held blameless for failure to exert additional efforts to restore the delayed hire during the 5 days the payment was lost." SBC Appendix on Appeal at 221; *see also* Healy, *Termination of Charter Parties*, 49 Tul. L. Rev. 845, 852 (1975).

In awarding SBC consequential damages, the District Court noted the rule of *Hadley* v. *Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854), that "consequential damages may include only those as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of breach of it" (B-24-25), but did not apply that rule. Its only "finding" on SBC's knowledge as to consequential damages was that SBC "as a major international bank, could reasonably foresee that failure to act promptly upon receipt of such a telex message could result in substantial damage to a customer of the bank." B-25.

The Court of Appeals reversed the District Court's decision on the basis of the single issue of SBC's liability for consequential damages.* Initially the Court of Appeals distinguished between the types of damages—direct and consequential—which might result from a bank's failure to transfer funds as requested by wire. A-8. It noted that Hyman-Michaels did not seek to recover any direct damages, which included the funds themselves, if lost, interest on them and the fee paid for the transfer. Hyman-Michaels sought, and the District Court had awarded, exclusively consequential damages. A-8.

The Court of Appeals held that the relevant case law of Illinois and other jurisdictions established that, in this type of commercial case, the rule of *Hadley* v. *Baxendale* applied, regardless of whether the action was brought on a contract or tort theory, and, under the rule of *Hadley*, consequential damages could be awarded only if the de-

* SBC had also appealed on seven other grounds, none of which was addressed by the Court of Appeals.

fendant was put on notice of the special circumstances giving rise to them. The District Court, the Court of Appeals found, did not apply this rule of law: "The legal principles that we have said are applicable to this case were not applied below." A-17. The "foreseeability" found by the District Court was not the type of notice of the circumstances which under the controlling rule of Illinois law justified an award of consequential damages: "[T]hat kind of foreseeability, which is present in virtually every case, does not justify an award of consequential damages." A-17. The Court of Appeals determined as a matter of law that on the undisputed facts SBC was not aware of special circumstances which would give it reason to foresee Hyman-Michaels' losses: "The undisputed facts, recited in this opinion, show as a matter of law that Hyman-Michaels is not entitled to recover consequential damages from Swiss Bank." A-17. Accordingly, the Court of Appeals reversed with a direction to enter judgment for SBC. A-17, A-19.

REASONS FOR DENYING THE WRIT

I.

None of the Traditional Reasons for the Granting of Petitions for a Writ of Certiorari Are Set Forth in the Petition.

The petition does not present any of the types of questions which have commonly been found to warrant the granting of certiorari. It demonstrates no conflict between the circuits; no conflict on a federal question between the federal court and the state court of last resort; no conflict

among state courts on a federal question; no important question of federal law; and no departure from the accepted and usual course of proceedings which would call for an exercise of this Court's power of supervision. *See* Rules of the Supreme Court of the United States, Rule 17.

Petitioner's arguments that the Court of Appeals misinterpreted Illinois intermediate appellate decisions (Pet. at 33-35) and that the rule applied by that Court has undesirable policy implications (Pet. at 14) are facets of petitioner's dispute with the Court of Appeals' reading of Illinois commercial law. This is not a "special and important" reason for granting certiorari. It is the "general policy" and the long-standing practice of this Court to "leave undisturbed" the holdings of federal courts of appeals in cases requiring the application or construction of state law. *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701, 707-08 (1949); *accord, Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 462 (1967); *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 534 (1949). The reason for this Court's reluctance to review state law determinations by the courts of appeals is plain: "The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues." *Butner* v. *United States*, 440 U.S. 48, 58 (1979) (declining to review the state law question on which a divided court of appeals panel had reversed the district court); *accord, United States* v. *Durham Lumber Co.*, 363 U.S. 522, 526-27 (1960); *Estate of Spiegel* v. *Commissioner, supra*, 335 U.S. at 706-07. That the state law issue is, as here, one of first impression, or an especially

difficult one, does not vary this Court's general policy. *See Estate of Spiegel* v. *Commissioner, supra,* 335 U.S. at 707; *United States* v. *Durham Lumber Co., supra,* 363 U.S. at 526. Indeed, the general policy is so well established that where it later develops that the issue raised "primarily implicates" a question of state law and "presents no federal question of substance" the Court has dismissed writs as improvidently granted. *Wolf* v. *Weinstein,* 372 U.S. 633, 636 (1969). There is no reason here to depart from the general rule.

Petitioner's other complaint about the Court of Appeals' decision, that it disregarded the District Court's findings of fact in violation of Rule 52(a) of the Federal Rules of Civil Procedure, does not provide a "special and important" reason to review that Court's decision. Rule 52(a) is not at issue for, contrary to petitioner's contention (Pet. at 19-31), the Court of Appeals did not reverse any relevant findings of fact made by the District Court.* The Court of Appeals applied legal principles misconstrued by the District Court to find that "[t]he undisputed facts, recited in this opinion, show as a matter of law that Hyman-Michaels is not entitled to recover consequential damages from Swiss Bank." A-17. *See* Section III *infra.* As this Court has held, an appellate court is free to make an "independent determination as to the legal conclusions and inferences which should be drawn from" the lower court's findings. *United States* v. *Mississippi Valley Generating Co.,* 364 U.S. 520, 526 (1961); *see United States* v. *E.I. du Pont de Nemours & Co.,* 353 U.S. 586, 598 (1957);

* There is thus no federal question presented concerning the interpretation or application of a rule of federal procedure.

Great Atlantic & Pacific Tea Co. v. *Supermarket Equipment Co.*, 340 U.S. 147, 153-54 (1950).

The Court of Appeals' determination that SBC was entitled to judgment was consistent with the usual and accepted judicial practice. Since the undisputed facts developed at a full trial established as a matter of law that SBC had no reason to foresee the damages sought by Hyman-Michaels, considerations of sound judicial administration called for this resolution rather than a remand. *See, e.g., Grosso* v. *United States*, 390 U.S. 62, 71-72 (1968); *Levin* v. *Mississippi River Fuel Corp.*, 386 U.S. 162, 170-71 (1967); 28 U.S.C. §2106 (1977).

II.

The Court of Appeals Correctly Determined That the Rule of *Hadley* v. *Baxendale* Applied to This Case Under Applicable State Law.

A. The Illinois law applied by the Court of Appeals does not "insulate" banks from liability in electronic funds transfers.

Hyman-Michaels' repeated assertion that the rule of law followed by the Circuit Court "insulates" banks from liability for damages flowing from the failure to effect funds transfers (Pet. at 14-18) is incorrect. Under the long-standing rule of law applied by the Court of Appeals a bank would be liable for direct damages which include the funds transferred, if lost, interest thereon and any fee charged. A-8. *Accord, Sharp* v. *Western Union Telegraph Co.*, 39 Ariz. 349, 353, 6 P.2d 895, 897 (1932). These are the damages which follow in the ordinary course of events from a failure to effect a wire transfer and, contrary to

petitioner's argument (Pet. at 18), these are exactly the sort of damages which are typically suffered if there is delay in payment.

It is not "unrealistic" to impose liability only if the special circumstances giving rise to damages which do not flow in the ordinary course of events from delay have been communicated to the bank. Pet. at 17-18. In the usual case the initiator of a wire transfer will not be subject to forfeiture if there is delay, and there will be no necessity to inform the banks of details of the underlying transactions. In the unusual case, such as this one, where extraordinary loss may flow from delay, there is nothing to prevent the customer from communicating to its bank the special risks involved and asking the bank to fashion a procedure designed to insure prompt payment.*

What is "unrealistic" is to expect banks involved in the electronic funds transfer system to accept and act upon unsolicited requests for transfers, which concern transactions about which the banks have no knowledge, at the risk of being subjected to unlimited unforeseeable damages in the event of a mishap. In the electronic funds transfer system, banks such as SBC are unknowing and involuntary recipients of hundreds of wire transfer requests daily. In this case, for example, there was lacking any prior notice to SBC of the risks Hyman-Michaels would have it run, and any opportunity for SBC to make an informed choice about whether to participate at all in such a high-risk transaction or to specify the type of procedures and level of

* Indeed, Hyman-Michaels argued throughout this proceeding that it gave Continental just the type of individualized notice required by *Hadley* and that Continental shaped the wire transfer procedure accordingly. Moeng Test., Tr. at 79-81. There is nothing in the record to indicate that such notice could not have been given to SBC.

compensation under which it would undertake the transaction. In the absence of such notice and opportunity, SBC here (and banks generally) should not be subject to liability for enormous and unforeseeable losses. *See* A-10-11, A-15-17.

Moreover, adoption of the rule for which petitioner argues would pose tremendous obstacles to the continued, efficient operation of the existing wire transfer system. If that rule were to govern, and banks were to be charged with the extent of damages sought by Hyman-Michaels (*i.e.*, damages nearly 100 times the amount of the wire transfer and nearly one million times the amount charged by Continental for the transfer) no bank could rationally undertake to effect a wire transfer without knowing the nature and extent of the risk of all of its transfers. In the absence of such knowledge it could not take the extraordinary precautions necessary to avoid being saddled with economically devastating liability. Yet this would require it to know in advance details about the business transactions of each of the hundreds of individuals and companies who daily initiate wire transfers to each of its various offices, a result far more disruptive of the efficient operation of the wire transfer system than what petitioner feels is "unrealistic". *See* A-15.

B. The state law authorities unanimously support application of the *Hadley* rule to the facts of this case.

The Court's application of the rule of *Hadley* v. *Baxendale* to determine the extent of damages recoverable for delay in transmission of a wire transfer of funds, regardless of whether the claim is made in tort or contract, was in

accord with the decision in *Hadley* v. *Baxendale* and the case law which has addressed situations similar to this one.* *Hadley* v. *Baxendale* itself involved a tort claim based upon a contractual relationship.** In the line of cases closely analogous to this one—actions against telegraph companies for damages for delay or failure in transmitting a message or funds†—the courts have held, without regard to the theory of liability, that damages will not be recoverable unless the telegraph company had reason to foresee at the time of entering into the contract for delivery that such damages would be the probable result of a breach. *See* 5 A. Corbin, *Contracts* §1019 at 121-23 (1964).

The question was expressly presented to the New York Court of Appeals in *Kerr S.S. Co.* v. *Radio Corp. of America*, 245 N.Y. 284, 157 N.E. 140, *cert. denied*, 275 U.S. 557 (1927), where plaintiff argued that "the action is one in tort for the breach of duty owing from a public service corporation, and that the rule of *Hadley* v. *Baxendale* does

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* Petitioner's suggestion that the Court of Appeals decided this case as a "contract case" rather than a "tort negligence case" (Pet. at 38) misses the point. The ruling of the cases upon which the Court of Appeals relied and the rationale of the Court's decision is that the *Hadley* rule of damages, which governs the discrete category of commercial cases resolved here, does not depend on the labels affixed to the cause of action. Petitioner's argument also ignores the fact that it asserted both contract and tort claims below and the District Court viewed the relationship of SBC and Hyman-Michaels as essentially contractual in nature. *See* B-13.

** *See* Danzig, *Hadley* v. *Baxendale: A Study in the Industrialization of the Law*, 4 J. Leg. Stud. 249, 260 (1975), *citing Hadley* v. *Baxendale*, *supra*, 9 Ex. at 343, 156 Eng. Rep. at 147.

† Distinguishing the telegraph cases from the instant case is that the telegraph company at least had the opportunity of direct face-to-face contact with the customer. Here, Hyman-Michaels was Continental's customer and SBC was without means of ascertaining the peculiar risks of this transaction.

not protect the carrier unless sued upon the contract." *Id.* at 292, 157 N.E. at 142. Rejecting that argument, then Judge Cardozo explained that "[t]hough the duty to serve may be antecedent to the contract, yet the contract when made defines and circumscribes the duty", cited numerous decisions ignoring the tort-contract distinction in the damages context, and noted that "there is little trace of a disposition to make the measure of the liability dependent on the form of the action." *Id.* at 292, 157 N.E. at 143. *Accord, Sharp* v. *Western Union Telegraph Co., supra,* 39 Ariz. 349, 353, 6 P.2d 895, 897 (1932).

The only Illinois case dealing with liability for failure to transmit money is *Siegel* v. *Western Union Telegraph Co.,* 312 Ill. App. 86, 37 N.E.2d 868 (1st Dist. 1941). While the opinion in *Siegel* does not state that the action was brought in tort, neither does it indicate that the case was pleaded as a contract claim. Pet. at 34. In fact, the Appellate Court refers to defendant's "negligence" in handling the transmission. *Id.* at 88, 91, 95, 37 N.E.2d at 869, 871, 872. The Illinois Appellate Court in *Siegel* evidently did not deem it sufficiently important to note the nature of Siegel's cause of action. The Court of Appeals properly found that *Siegel* by implication supports application of the *Hadley* rule in analogous cases regardless of the appellation applied to the cause of action.*

* The Circuit Court's acknowledgement that "[a]s so often in diversity cases, there is an irreducible amount of speculation involved in attempting to predict the reaction of a state's courts to a new issue" (A-11) does not cast doubt on its conclusion. Pet. at 33. The courts of appeals are required to decide state law issues regardless of whether that law is settled or uncertain. *Meredith* v. *Winter Haven,* 320 U.S. 228, 231 (1943).

The 1903 Illinois Appellate Court opinion which petitioner asserts as controlling, *Miller* v. *John*, 111 Ill. App. 56 (2d Dist. 1903), *aff'd*, 208 Ill. 173, 70 N.E. 27 (1904), has nothing to do with the issue presented here.* The plaintiff there had been defrauded into exchanging land which he owned for land represented by the defendants to be far in excess in value of the land plaintiff held although in fact of much lesser value. The procedural issue before the court was whether causes of action for fraud and deceit and for fraud arising out of an agency relationship were misjoined, not whether the rule of *Hadley* would apply to limit the recovery of consequential damages.** *Hadley* does not apply to fraud actions, and a fraud case such as *Miller* has no bearing on the issues herein. The court's conclusion was simply that labelling the parties principal and agent

* Petitioner raised this case for the first time on the petition for rehearing. It ill behooves petitioner to suggest that the *Miller* case, available at the time of the appeal but not cited by petitioner, is somehow controlling. Nor did petitioner cite below the 1924 law review article (Pet. at 32-33) upon which it here relies. That article in any event does not say, as petitioner suggests, that the *Hadley* rule applies "only" in contract cases.

** Even if the *Miller* decision were on point, it would not be dispositive. An Illinois Appellate Court decision is not binding on a federal court in all circumstances. *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 465 (1967). There was evidence here to indicate that the highest court of Illinois would not follow petitioner's interpretation of the *Miller* decision. Not only have post-*Miller* courts in Illinois and other jurisdictions applied the *Hadley* rule to cases analogous to this one, but the Illinois legislature has since recognized the necessity of limiting liability in the analogous situation of collecting banks. Ill. Rev. Stat. ch. 26 §4-103(5) (1979) (rule that a collecting bank is not liable for consequential damages in the absence of bad faith). *See also Western Union Telegraph Co.* v. *Esteve Bros. & Co.*, 256 U.S. 566, 574 (1921); *Siegel* v. *Western Union Telegraph Co.*, *supra* (upholding limitation of liability of telegraph and telephone companies for negligent transmission under federal regulatory law). Moreover, *Miller* has never been cited for the proposition for which petitioner propounds it.

does not change the essential nature of the claim asserted—there, a tort claim. To the extent the case is applicable here at all it supports application of the *Hadley* rule to this commercial transaction. Characterizing SBC as Hyman-Michaels' agent, as the District Court did,* does not change the rule of damages to be applied to what is essentially a contractual cause of action.

C. The Court of Appeals properly interpreted the rule of *Hadley*.

The Court of Appeals' reading of *Hadley* (*i.e.*, "that consequential damages will not be awarded unless defendant was put on notice of the special circumstances giving rise to them" (A-10)), far from being "parsimonious" (Pet. at 38), is entirely consistent with the long standing American interpretation of the *Hadley* rule.** The classic and continuing formulation of the *Hadley* rule requires that the

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* The District Court's dicta on the agency issue did not rest on any factual analysis but solely on an analogy of a correspondent bank to a collecting bank under Article 4 of the U.C.C., which, under Section 4-201 of the Code, is presumed to be an agent of the bank's customer. Strikingly, the District Court declined to apply the provision of Article 4 which eliminates liability of a collecting bank for consequential damages in the absence of bad faith. Had it carried through on its analogy, instead of selectively applying the rules of Article 4, the massive liability to which the District Court subjected SBC would never have been imposed. Alternatively, had the District Court looked to the split of authority which existed before the Code concerning the relationship of a collecting bank and depositor, it might well have followed those jurisdictions which held no agency relationship to exist in that situation. *See* Annot., *Liability of Correspondent Bank to Depositor in Forwarding Bank for Breach of Duty as to Collection of Paper*, 58 A.L.R. 764, 765 (1929). *Cf. Cohen* v. *Tradesmen's National Bank*, 262 Pa. 76, 105 A. 43 (1918) (collecting bank is not agent of drawer of check negligently handled by collecting bank).

** Since the rule of *Hadley* is applicable, petitioner's reliance on authorities concerning the standard of foreseeability in tort (Pet. at 36) is misplaced.

defendant must have "reason to foresee [the injury] as a probable result of his breach when the contract was made." *Restatement (First) of Contracts* §330 (1932). The Restatement (Second) of Contracts §351(2) (1981) states that a party in breach is liable for a foreseeable loss, which is defined "as a probable result of a breach because it follows from the breach (a) in the ordinary course of events." If the injury does not follow the breach in the ordinary course of events, the party in breach is liable for consequential damages only if it "be shown specifically that the defendant had reason to know the facts and to foresee the injury," *Restatement (First) of Contracts* §330 (1932), or, if loss follows from the breach "as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know." *Restatement (Second) of Contracts* §351(2)(b) (1981). The rule is "objective" in that it does not require an actual agreement for a specific loss or for the defendant actually to have foreseen the precise loss. Nevertheless, characterizing the test as objective (Pet. at 39) leaves unchanged the requirement that if the injury does not follow the breach in the usual course of events, the defendant must have "had reason to know" of special circumstances from which it does flow and reason to foresee the injury.*

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* The sole American case cited by Hyman-Michaels (Pet. at 40) is not to the contrary. Indeed, *Gurney Industries, Inc.* v. *St. Paul Fire & Marine Insurance Co.*, 467 F.2d 588, 598 (4th Cir. 1972), applying North Carolina law, relies on the Restatement (First) of Contracts §330 and quotes language from controlling North Carolina authorities which is verbatim the language of *Hadley* v. *Baxendale*. Professor Gilmore in *The Death of Contract* at 83-84, 88 (1974) does not cite a single American case which modifies the rule of *Hadley* and the continued adherence to the *Hadley* rule of the Restatement (Second) of Contracts, published some seven years after that book, undercuts any suggestion therein that the American rule has changed.

Petitioner's suggestion that the concept of individualized notice of special circumstances does not comport with the reality of modern banking transactions (Pet. at 40-41) is contrary to the position embodied in the just published Restatement (Second) of Contracts §351 (1981), and ignores the fact that the Illinois courts continue to adhere to the *Hadley* rule. *E.g., Spangler* v. *Holthusen*, 61 Ill. App. 3d 74, 378 N.E.2d 304 (2d Dist. 1978).

III.

The Court of Appeals Did Not Disregard the District Court's Findings of Facts.

The Court of Appeals did not reverse any of the District Court's findings on foreseeability of damages, or substitute its own findings for those of the District Court. Indeed, there were no relevant findings on foreseeability to reverse for, contrary to petitioner's contention (Pet. at 24), the District Court made no finding on whether SBC had reason to foresee the injury for which Hyman-Michaels sought recompense in this action. B-25.* The District Court's only finding was that SBC could foresee some injury resulting from a delay in effecting a fund's transfer—*i.e.*, SBC could foresee that failure to act promptly upon receipt of a wire transfer request could result in "substantial damage".** This finding was neither ignored nor reversed

* There is no finding by the District Court that, as petitioner argues, "Swiss Bank did foresee or at least ought to have foreseen 'in a general way' the consequence of lost profits resulting from its negligent mishandling of a telex, even if the precise extent of the harm might have been unforeseen." Pet. at 37-38.

** Had the District Court found on the facts before it that SBC had reason to foresee the type of harm Hyman-Michaels suffered, the finding would have been clearly erroneous. That many wire transfers involve large sums could not possibly have put SBC on notice of a

(footnote continued on next page)

by the Court of Appeals. Pet. at 23-24. Rather, the Court of Appeals specifically considered it and expressly ruled that this type of "general foreseeability" was insufficient under the prevailing law of Illinois to justify an award of consequential damages. A-17.

The Court of Appeals' conclusion as a matter of law that Hyman-Michaels was not entitled to recover consequential damages was compelled, as the Court found, by the undisputed facts. The only circumstances about Hyman-Michaels of which SBC was aware was that the requested transfer was payment for the hire of a vessel for a two-week period. SBC "did not know or have reason to know how at once precious and fragile Hyman-Michaels' contract with the Pandora's owner was." A-15. Hyman-Michaels' contention that "anyone who has ever paid rent on a monthly basis on an apartment knows that in most cases the payment is due on or before the date beginning the monthly rental period" (Pet. at 23), is an argument, not a finding of fact, and was made to, and rejected by, the Court of Appeals. Common experience is that rent is due within some specified period after the beginning of the period for which it is paid, and delay in payment normally does not result in eviction or forfeiture. The Court of Appeals also properly rejected any suggestion that the use of a wire transfer could be the basis for putting SBC on notice of the type of damages involved here.* Wire transfers are

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loss of the magnitude Hyman-Michaels claims to have suffered. The measure of loss from delay of a wire transfer is usually interest, and the interest for a few days on even a very large sum does not compare to the lost profits Hyman-Michaels seeks—amounting to nearly 100 times the amount of the wire transfer.

* This conclusion does not reverse that of the District Court, which was only that use of a wire transfer put SBC on notice that delay could result in "substantial damage." B-25.

today used extensively and routinely by businesses. SBC at its Geneva office alone handles tens of thousands of such requests annually. The election by the sender of each of these requests to use the wire transfer system could hardly give SBC reason to foresee a risk of loss from delay of a hundred times the amount of the given transfer.

The Court of Appeals did not redecide or reconsider, as Hyman-Michaels seems to suggest (Pet. at 25), the ruling of the District Court on the issues of negligence or contributory negligence.* Had it wished to do so, of course, the Court could have determined the issue of contributory negligence as a matter of law, as did the District Court.** B-21. The Court of Appeals, however, did not address whether Hyman-Michaels was barred from recovery under the tort doctrine of contributory negligence because of a failure to act with "reasonable care." Rather, the Court of Appeals assessed the facts found by the District Court and considered Hyman-Michaels' conduct in determining

* For this reason, quotation of the District Court's findings on whether SBC owed Hyman-Michaels a duty of care and whether it had breached that duty (Pet. at 19) is misplaced.

** Under Illinois law contributory negligence may be decided as a matter of law. *E.g., Pearson* v. *Ford Motor Co.*, 32 Ill. App. 3d 188, 192, 336 N.E.2d 528, 531 (1st Dist. 1975); *see Hulett* v. *Central Illinois Light Co.*, 99 Ill. App. 3d 211, 424 N.E.2d 1366 (3d Dist. 1981). Hyman-Michaels is wrong in stating that a finding of lack of contributory negligence is a finding of fact "which cannot be overturned on appeal unless there was no support for such a finding on the record." Pet. at 25-26. The Fifth Circuit in *United States* v. *Hill Lines, Inc.*, 175 F.2d 770 (5th Cir. 1949) (Pet. at 26), an action brought under the Federal Tort Claims Act, relied on Texas law, not Illinois law. Moreover, the cases petitioner cites make clear the findings of negligence are subject to the same clearly erroneous rule as other findings—they may be set aside when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed". *McAllister* v. *United States*, 348 U.S. 19, 20 (1954) (Pet. at 26); *see* Pet. at 20-21.

whether consequential damages should be imposed on SBC for its "middleman" link in an electronic funds transfer.

None of the material facts relied upon by the Court in its decision were reversals of findings made by the District Court, as Hyman-Michaels claims. Pet. at 26. The Court correctly noted that Hyman-Michaels had waited "till *arguably* the last day before payment was due to instruct its bank to transfer the necessary funds overseas" (*i.e.*, that it waited to the last possible moment to try to make payment (A-11)). A-13 (emphasis added). The payment was due "in advance" and was for the period April 27-May 11. The owners of the vessel had argued in the arbitration that payment was required by the end of the day on April 26th and the arbitrators apparently did not decide the question, stating only that payment was not made "when due on April 26th or April 27." RA-3. While the District Court felt that payment was due on April 27th, this was not a finding of fact but rather an interpretation of the charter and thus a question of law for the court, *e.g.*, *Aircraft Products Co.* v. *Universal Oil Products Co.*, 100 Ill. App. 3d 694, 697-98, 427 N.E.2d 585, 587 (1st Dist. 1981), and the Court of Appeals did not reverse that conclusion when it noted that payment was "*arguably*" due on April 26th. It is that fact which is of significance in assessing whether Hyman-Michaels acted prudently in the initiation of the wire transfer.

Hyman-Michaels' declaration that it allowed three business days lead time to carry out the instruction (Pet. at 26) ignores the fact, which the District Court acknowledged (B-9), that morning in Chicago is late afternoon in Geneva. Morning on April 25 in Chicago in neither three business

days nor three calendar days before the end of April 27 in Geneva, the latest that even Hyman-Michaels suggests payment was due, and is barely one and a half business days from the date payment was "arguably" due.

Regardless of whether the District Court felt a longer lead time would have produced a different result in this case (Pet. at 27), it is apparent that a longer lead time would have materially lessened the chance that mere delay in handling by one of the banks would have caused late payment and given the vessel owner an excuse to withdraw. *See* Seipmann Test., Tr. at 1140-41. The significance of sufficient lead time is established by the procedures established by Hyman-Michaels itself to handle its wire transfer payments after the April 27 incident. It substantially lengthened the lead time as well as required a confirmation from the owner's bank, Banque de Paris. Continental Ex. 45; Moeng Test., Tr. at 168-72.

Both the arbitration panel which held against Hyman-Michaels and permitted the vessel owner to withdraw the Pandora from the charter (RA-4) and the Court of Appeals (A-13) were struck by Hyman-Michaels' lack of diligence once it learned that payment had not been received.* The record supports the Court's conclusion that Hyman-Michaels did not act with prudence after learning, early on April 27, that the Pandora's owner had not received payment and was attempting to cancel the charter. Hyman-Michaels alone knew the necessity for immediate payment and it was up to Hyman-Michaels to communicate

* The District Court made no finding on this point, and none of the three actions taken by petitioner which the District Court noted (Pet. at 28-29) undercuts the conclusion of the arbitrators and the Court of Appeals concerning petitioner's conduct.

the urgency of the situation to Continental, and to monitor Continental's efforts.* Hyman-Michaels argues, where it suits it, that wire transfers are "essentially instantaneous". Pet. at 26. Had Hyman-Michaels acted immediately and instructed Continental to send another telex forthwith, the transfer might still have been effected on April 27 and certainly by April 30. Seipmann Test., Tr. at 1146-47, 1149-50. In light of the rationale for the arbitrators' decision, this could have made all the difference. A-13.

* The merits of Hyman-Michaels' dispute with Continental as to whether or not it was necessary to authorize a duplicate payment are irrelevant to a determination of SBC's liability for consequential damages. The fact is that Hyman-Michaels' direction to Continental to "persist in attempting to make this payment" did not result in prompt payment after Hyman-Michaels received notice of withdrawal from the Pandora's owner on the morning of April 27.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be denied.

Respectfully submitted,

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DWIGHT A. HEALY
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Of Counsel

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* Swiss Bank Corporation has no parent company. Swiss Bank Corporation has the following subsidiaries (except wholly owned subsidiaries) and affiliates: Adler & Co. Ltd.; Ferrier Lullin & Cie S.A.; Bodenkreditbank in Basle; INDELEC Swiss; Swiss Electric and Traction Company; INDELEC Finanz AG; Commercial Bank of Basle Financing and Participations Company; International Financing Company Ltd.; Factors Ltd.; W. H. Beglinger Finance Corporation; SERIMO Immobiliendienste AG; UNEFICO Universal Engineering and Finance Corporation; Prognos Ltd.; INTERFONDS International; Societe Internationale de Placements, SIP; Universal Engineering Corporation; TRANSPLAN Ltd.; Banque de Placements et de Credit; and Fominver S.A.

APPENDIX

Second Arbitration Award

AWARD

by

Michael A. van Gelder (Chairman)
Hammond L. Cederholm
Peter Siebel, Jr.

In the matter of
the Arbitration

— between —

HYMAN MICHAELS COMPANY
Time Charterers

— and —

PANDORA SHIPPING COMPANY
Owners of
M/V PANDORA

APPEARANCES: For Charterers:

HILL, BETTS AND NASH
(D. I. Gilchrist, Esq. of Counsel
(S. J. Murray, Esq.

For Owners:

KIRLIN, CAMPBELL AND KEATING
(David Nourse, Esq. of Counsel
(Kevin Slakas, Esq.

HISTORY:

This Arbitration, the second one to be held under this Charter Party, is called by Charterers upon Owners notice of withdrawal of vessel from service for alleged late payment of hire installment No. 19. It was agreed by the parties that the matter should be arbitrated and in the meanwhile the vessel would perform the intended voyage (Grain U. S. Gulf/Poland), subject to any damages that might subsequently be payable dependent upon this Award.

A Submission agreement was drawn in two parts, and signed by Attorneys for the contestants.

Part I calls upon the Panel to decide the question:

> "Has the Owner the right under the terms of the Charter Party dated June 19, 1972 and all the relevant facts and circumstances relating thereto to withdraw the vessel from the Time-Charter?"

PART II

Dependent upon the reply to that question, all questions of damages of either party, if any, to be submitted to a further determination by the same Panel, in the event that the parties hereto are unable to agree among themselves as to such damages.

HEARING:

The Panel heard Owners presentation at a hearing on May 8th and the Charterers presentation, with testimony from witnesses on May 14th. As agreed, Briefs were to be submitted so as to reach the Panel shortly after noon on May 17th. These were received in due time. Owners also presented in letter form a reply Brief which reached all members of the Panel very shortly before the time set

for deliberations on May 18th, and clearly later than the early afternoon of May 17th. As this was not prescribed at the hearing, as stipulated in the record, the Panel have found its presentation out of order, and have not considered it in its deliberation.

AWARD:

The Panel having carefully read the documents and testimony presented to it, and taking into consideration the ruling made on the same matter at the first Arbitration, are unanimously of the opinion that Charterers were in breach of their obligations in the fact that the payment of the 19th hire installment did not reach Owners at the proper time in accordance with the Charter Party conditions. However, the Panel is unanimously of the opinion that the root cause of this situation did not lie with Charterers, as very definite proof was shown to the Panel that payment was properly made by Charterers in sufficient time on April 25th A.M., through their Bank, Continental Illinois Bank of Chicago; further that this Bank acting properly and expeditiously in accordance with established proven practices, instructed their correspondent bank (Swiss Bank Corporation) in Geneva, Switzerland, by telex in due time to make the said payment to Owners' bank in Geneva, but that Swiss Bank Corporation, having acknowledged the message by teletype (answerback automatically received by Continental Illinois Bank) thereupon lost the said instructions and failed to make payment when due on April 26th or April 27th. Charterers were only made aware of this matter upon receipt of a message from Owners on April 27th at 8:30 A.M. Chicago time, that vessel was being withdrawn for non-payment of the 19th hire installment.

Up to this point, the Panel regards Charterers as blameless and having properly executed their Charter Party commitments and obligations in this matter. (Bank error being beyond their control).

The Panel next considered the question of whether Charterers, on being faced with this situation, did everything in their power to remedy it. The action taken was immediate but did not prove to be adequate, in that the Bank and it's correspondent required some 5/6 days to trace and effect the lost instruction to remit. Charterers could have ordered an immediate duplicate payment—or even sent a Banker's check by hand or special messenger, so that the funds could have reached owners' Bank, not later than April 28th. This was not done and Charterers relied upon the Continental Illinois Bank to find and rectify the delayed payment. This, therefore, created the opening that Owners were seeking to withdraw the vessel from service under a Charter Party that they entered into last summer before the market rates rose to current levels. This Panel is unanimous in their view that Owners were looking for any slight breach by Charterers (as evidenced by the telex message sent giving notice of withdrawal on the first possible moment and even before the actual anniversary time on April 27th). Charterers acted imprudently in not allowing time for any Bank delays in payment transfer arrangements and the Charter Party Clause 5 clearly gives Owners the right to withdraw the vessel. That is the legal and contractual situation, and with reluctance, the Panel unanimously find that Owners are entitled to exercise their liberty as set out in Clause 5 to withdraw the vessel from the service of the Charterers.

However, with equal unanimity, the Panel finds that in all equity, it would be quite improper for the Owners to profit unduly and Charterers to suffer unreasonable financial loss in this case, as Charterers were partially in this position by third parties' inaction. This Panel would be inclined to consider a reasonable and equitable financial arrangement but under the terms of the second part of the Submission Agreement are not empowered to do so.

The Panel unanimously set their fees at a total amount of $1950.00 payable as to $325.00 to be paid to each arbitrator by Owners and $325.00 to be paid to each arbitrator by Charterers and $15.00 by Charterers and Owners each to the Chairman for expenses in preparing the Award. Costs of transcript are to be shared equally and each party to pay it's own legal expenses. Arbitrators fees and expenses as noted and all other items of expense as expressed herein are to be considered as part of this Award. Responsibility for payment of fees and expenses will be joint and several as between Owners and Charterers, and if in the first instance payment is made by either party, it will be entitled to recover same from the other as part of their Award.

/s/ HAMMOND L. CEDERHOLM

Hammond L. Cederholm, Arbitrator

/s/ PETER SIEBEL, JR.

Peter Siebel, Jr., Arbitrator

/s/ MICHAEL A. VAN GELDER

Michael A. van Gelder, Chairman

New York, N. Y.
May 21, 1973